SUPREME COURT, U. S.

FILED
MAR 26 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1968

No. 1202

SPEYER, INC. and YELLOW CAB COMPANY OF ERIE,
Petitioners

v.

HUMBLE OIL & REFINING COMPANY and A. O. SMITH CORP.,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

WILLIAM W. KNOX, ESQ.
23 West 10th Street
Erie, Pennsylvania 16501
JOHN G. GENT, ESQ.
1415 G. Daniel Baldwin Building
Erie, Pennsylvania
Attorneys for Petitioners

KNOX, GRAHAM, PEARSON & MCLAUGHLIN
QUINN, PLATE, GENT, BUSECK & LEEMHUIS,
Of Counsel
March 1969

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

INDEX

Page

Opinions Below 1

Jurisdiction 1

Questions Presented for Review 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 8

I. Failure to Apply Pennsylvania Law on Investigation and Retirement from Service .. 8

II. Failure to Apply Sec. 402a Restatement of Torts as Required by Pennsylvania Law 11

III. Unfair Result of Pretrial Procedures 16

Conclusion 21

Appendix A—Opinion of the United States District Court for the Western District of Pennsylvania .. 22

Appendix B—Opinion of the United States Court of Appeals for the Third Circuit 42

Appendix C—Statutory Provisions Involved 53

TABLE OF CITATIONS

Cases:

Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 76 S. Ct. 273 8

Blanken v. Bechtel Properties, Inc., (1961) 194 F. Supp. 638, affirmed 299 F. 2d 928 18

Carl D. Citron v. Aro Corporation, 377 F. 2d 750, cert. den. 389 U.S. 973, 88 S. Ct. Reporter 473 20

TABLE OF CITATIONS—*(Continued)*

Cases: Page

Erie Railway Co. v. Thompkins, 304 U.S. 64 .. 2, 8, 11, 12, 16

Foley v. Pittsburgh Des Moines Co., 363 Pa. 1, 63 A. 2d 517 (1949) 11

Fredericks v. Atlantic Refining Company, 282 Pa. 8, 127 Atl. 615 7

Goodman & Theise, Inc. v. Scranton Spring-Brook Water Service Co., 352 Pa. 488, 42 A. 2d 111 (1945) 7, 9

Griffin v. Atlantic Refining Co., 305 Pa. 386, 157 A. 791. 9

Heller v. Equitable Gas Co., 333 Pa. 433, 3 A. 2d 343 (1939) 7, 9

Hemrock v. Peoples Natural Gas Co., 423 Pa. 259, 223 A. 2d 687 (1966) 7, 9, 11

Pryor v. Chambersburg Oil and Gas Co., 376 Pa. 521, 103 A. 2d 425 (1954) 7, 9, 11

Webb v. Zern, 422 Pa. 424, 220 A. 2d 853 (1966) . 7, 12, 13, 14, 15, 16

Constitution:

United States Constitution, Fourteenth Amendment .. 3

Statutes:

Federal Rules of Civil Procedure, Rule 16 ..... 17, 18

28 U.S.C. 1254(1) 1

28 U.S.C. 1652 ..... 3, 8

Other Authorities:

Barron and Holtzoff, Federal Practice and Procedure (1960 Edition to Pocket Parts) 18

Restatement of Torts (2d), Sec. 402a .. 2, 7, 11, 12, 13

IN THE

Supreme Court of the United States

October Term 1968

No. .....

SPEYER, INC. and YELLOW CAB COMPANY OF ERIE,
Petitioners

v.

HUMBLE OIL & REFINING COMPANY and A. O. SMITH CORP.,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioner prays that a writ (or writs) of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit which affirmed a judgment of the United States District Court for the Western District of Pennsylvania.

Opinions Below

The opinion of the District Court (R-1172a to R-1213a) is reported at 275 F. Supp. 861, and appears at pp. — infra. The opinion of the Court of Appeals (App. p. 1) is not yet reported; it appears at pp. — infra.

Jurisdiction

The judgment of the Court of Appeals was entered on November 12, 1968. A timely petition for rehearing was denied on January 7, 1969. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

Questions Presented for Review

(1) Did the Court of Appeals fail to apply Pennsylvania law which requires a supplier of gasoline to investigate the causes of a malfunction in the unit dispensing the gasoline after knowledge of a malfunction causing large quantities of gasoline to escape from the pump through a fractured casting, to retire the pump from service, or to warn plaintiffs not to use the pump unit pending the determination of the causes of the malfunction, particularly where the gasoline supplier's experts admitted that the pressure built up in the pump system was extraordinarily dangerous and required immediate investigation for the discovery of the cause of the first malfunction, thus refusing to give proper application of Pennsylvania law as required by *Erie Railway Co. v. Tompkins*, 304 U. S. 64?

(2) Did the Court of Appeals fail to apply Sec. 402a of the *Restatement of Torts* (2d) as required by applicable Pennsylvania law, thus resulting in a refusal to apply applicable state law as required by the decision of this Court in *Erie Railway Co. v. Tompkins*, 304 U. S. 64?

This was a diversity suit brought to recover damages resulting from the destruction at plaintiff's property through the malfunction of a gasoline dispensing unit owned by defendant, Humble, and installed on plaintifi's premises. The Court of Appeals held (App. IX-X) that the gasoline pump and hose attached thereto did not constitute a container under Sec. 402a of the *Restatement of Torts* (2d), which it is submitted is contrary to the holdings of the Supreme Court of Pennsylvania.

(3) Did the District Court in this case misapply pretrial procedures under the Federal Rules of Civil Procedure, in a nonjury trial case by requiring the plaintiff to file a pretrial narrative statement two months in advance of commencement of hearings, then after four days of trial suspending the hearings for a month, and not requiring the

defendant to file a pretrial narrative statement, with reports of experts attached, until the morning of resumption of the hearings, thus placing plaintiffs at an unfair disadvantage in preparation of their case and preparation to meet defendants' case, which proceeded immediately upon resumption of hearings and immediately after the filing of defendant's pretrial narrative statement? A subsidiary question would be whether these procedures adopted by the District Court with respect to the filing of pretrial narrative statements resulted in a denial of due process of law and equal protection of the laws to the plaintiffs.

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are contained in the Fourteenth Amendment to the United States Constitution. The statutory provisions involved are 28 U. S. C. 1652, providing that the laws of the several states shall be regarded as rules of decision in civil actions in the Courts of the United States, and Rule 16 of the Federal Rules of Civil Procedure relative to pretrial procedure as supplemented by Rule 5 of the rules of the United States District Court for the Western District of Pennsylvania.

Statement of the Case

This was a diversity suit brought by the plaintiffs, two Pennsylvania corporations, to recover damages from the defendants, a Delaware corporation and New York corporation, for the destruction by fire of the building owned by plaintiff, Speyer, Inc., in Erie, Pennsylvania, and the taxicabs and other personal property therein owned by plaintiff, Yellow Cab. The action was based upon negligence, and also, with respect to defendant Humble, upon wilful and wanton misconduct.

Plaintiff Yellow Cab furnishes taxicab service in Erie, Pennsylvania and rented the building in question from plaintiff Speyer, Inc. for the purpose of housing and servicing its fleet of cabs. Located in the building was a gasoline dispensing unit, connected with a tank buried in the ground, by means of which gasoline was dispensed by defendant Humble to the taxicabs. The dispensing unit had been manufactured by Erie Meter Systems, Inc., predecessor of the defendant, A. O. Smith Corporation. The dispensing unit and tank were owned by defendant Humble and leased to Yellow Cab under an equipment lease dated November 1, 1955, copy of which will be found at 1154a. Humble had assumed the duty of maintaining and repairing this dispensing unit which consisted basically of a pump, metering device and hose with nozzle attached for the purpose of servicing gasoline requirements of the taxicabs. During the course of the intervening years between 1955 and 1964, on certain occasions the hoses had been damaged and replaced by Humble's agent, Jabe Construction and Equipment Company. On some occasions damage to the hose was caused by taxicabs driving off with the nozzle in the tank or hooking the hose over the bumper. At these times representatives of the Humble Oil Company observed the damage and replaced the hoses. This is not uncommon in the gasoline industry and was known to the representatives of Humble.

On October 16, 1963 (162a), Humble's agent replaced the hose on the pump which previously had been the type known as WWC with a different type known as Goodyear Flexsteel hose which contained a wire braid inside the hose covering. At no time prior to April 20, 1964 had any incident occurred with respect to the pump. On April 20, 1964 a cab pulled away from the pump with the hose caught on its bumper. Shortly thereafter a large quantity of gasoline was observed on the floor around the dispensing unit. The unit was installed in a wall with the face of the unit on one side of the wall, and a pipe attached to the pump passing

through the tile wall, and on the other side of the wall the hose was attached and on this side the cabs were serviced. See diagram, Exhibit 55, 1150a. This gasoline was cleaned up without any fire resulting. Yellow Cab's president immediately called Humble, and Humble's agent Jabe, was dispatched to remedy the situation. It was found that the meter cap at the top of the pump had been fractured, and a piece had been broken out of it by internal pressure (see photograph of meter cover, Exhibit 4, 1146a). Defendant Humble's agent, instead of attempting to determine what caused this unusual occurrence, proceeded merely to replace the meter cover on the pump with a substitute rebuilt cover, and assured Yellow Cab that everything was in order and safe for use (288a). Yellow Cab's president then called Humble's district representative and discussed the incident with him, and informed him of the seriousness of the situation, and that they did not want a recurrence (286a). Humble made no investigation to determine the cause of this malfunction in the intervening nine days before the fire (300a, 301a), and made no attempt to retire the dispensing unit from service pending investigation, nor to warn Yellow Cab as to its continued use.

On April 29, 1964, after a cab had taken on gasoline, it drove away with the nozzle in its tank. There was no spillage of gasoline from the hose or nozzle. The next cab attempted to gas up, but was unable to get any gasoline from the hose. Shortly thereafter, gasoline was discovered in large quantities on the floor, on the other side of the wall. While Yellow Cab's employees were attempting to clean it up and to remove the parked cabs from the area, the gasoline ignited from some unknown cause, and in the resulting fire the building of Speyer, Inc. was destroyed, together with a large number of taxicabs and other equipment of Yellow Cab. It was found that the casting at the top of the meter head had ruptured again by internal pressure in roughly the same way as the rupture of April 20, 1964 (see Photos 1148a, 1149a).

Later investigation disclosed that the Goodyear Flexsteel hose in question with the wire braid inside it had the peculiar property of suddenly contracting when pulled or jerked in the slightest degree with a resulting tremendous increase of hydrostatic pressure sufficient to rupture the casting at the top of the meter head in the manner described. The pump had no safety valve to relieve pressure coming from the hose end of the pump. The relief valves in the pump itself were not capable of relieving the pressures exerted in the system with the use of the Goodyear Flexsteel hose, although the hose was admittedly an integral part of the dispensing unit, without which it could not function. Although Goodyear Flexsteel hose had been on the market for attachment to gasoline pumps of this type since the late 1950's, Erie Meter Systems and its successor, A. O. Smith Corporation, had made no attempt to conduct tests with this type of hose, nor to install fail-safe devices on their units, nor to warn users and prior purchasers thereof as to the dangers inherent in this combination. It was concluded by experts for all the parties that the casting was ruptured by the internal pressure, and that the valves on the pump could not, and did not, relieve the pressure.

The case was tried in the Court below by Willson, D. J. sitting without a jury. The Court below directed that plaintiffs file a pretrial narrative statement and proceed with their testimony, prior to the filing of any pretrial narrative statement by the defendants. Plaintiffs' pretrial narrative statement was filed February 6, 1967 (12a). The trial commenced April 3, 1967, and continued through April 7, 1967, when the plaintiffs' case was concluded, and the trial was then continued to May 11, 1967. No pretrial statement was filed by defendant, Humble, until April 26, 1967, and the reports of their expert witnesses were not attached until the morning of the resumption of trial. Defendant, A. O. Smith Corporation, did not file a pretrial narrative statement until May 5, 1967 (13a). During these intervals, defendants conducted various tests of which plaintiffs were

not informed until three days before the resumption of the trial.

The Court of Appeals ignored the decisions of the Supreme Court of Pennsylvania which required investigation of the first malfunction and retirement of the unit from service until the cause of the malfunction was determined, or at least required warning to the plaintiffs not to continue to use the unit until the cause of the malfunction was discovered. As a matter of fact, the District Court and the Court of Appeals never discussed this issue at all, except to say that investigation would not have produced results within nine days. See *Pryor v. Chambersburg Oil and Gas Co.*, 376 Pa. 521, 103 A. (2d) 425, *Heller v. Equitable Gas Co.*, 333 Pa. 433, 3 A. (2d) 343, *Goodman & Theise, Inc. v. Scranton Spring-Brook Water Service Co.*, 352 Pa. 488, 43 A. (2d) 111, *Hemrock v. Peoples Natural Gas Co.*, 423 Pa. 259, 223 A. (2d) 687, *Fredericks v. Atlantic Refining Company*, 282 Pa. 8, 127 Atl. 615.

The Court of Appeals further determined that Sec. 402a of the *Restatement of Torts* (2d) as adopted and applied by the Supreme Court of Pennsylvania in *Webb v. Zern*, 422 Pa. 424, 220 A. (2d) 853 (1966), with respect to liability of a seller or defects in the container in which the substance sold is dispensed, did not apply to this case.

Basis for Federal Jurisdiction in the Court of First Instance

As stated above, the basis for federal jurisdiction was diversity of citizenship, the plaintiffs being Pennsylvania corporations, with their principal offices located in Erie, Pennsylvania, and the defendants being Delaware and New York corporations, with their principal offices located outside Pennsylvania.

Reasons for Granting the Writ

I. *Failure to Apply Pennsylvania Law on Investigation and Retirement from Service*

The Court of Appeals and the lower court failed to apply Pennsylvania law which required that when the gasoline pump in question had blown its top by fracturing a casting as the result of great internal pressures, it was the duty of defendant, Humble, the supplier of the pump to investigate the cause of this unusual and dangerous occurrence, and if unable readily to determine what had caused this peculiar malfunction, either to retire the pump from service until the cause was ascertained, or to warn the petitioners against its further use until such cause was determined. Although this basis for recovery and allegation of negligence had been relied upon by petitioners from the beginning of this case, and although the same was strenuously argued both in the District Court and in the Court of Appeals, neither court saw fit to discuss this principle of Pennsylvania law, nor to apply it in any way to the facts in this case. In so doing both courts failed to give proper application to Pennsylvania law as required by 28 U. S. C. 1652, providing that the whole body of state decisional and common law of the several states shall be regarded as rules of decision in civil actions in the courts of the United States as interpreted and applied by this court in *Erie Railway Co. v. Tompkins*, 304 U. S. 64.

This court has held that the purpose for the rule is to provide the same results for litigants whether their cases are tried in state or in federal courts.

Since *Erie Railway Company v. Tompkins*, supra, this Court has held that where the Court of Appeals and the District Court has not properly applied state law to the decision of the case, then certiorari should be granted to determine whether the federal law (28 U. S. C. 1652) has been violated. See *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 198, 76 S. Ct. 273, where the court said:

> "The case is here on a petition for certiorari which we granted, 349 U. S. 943, 75 S. Ct. 873, because of the doubtful application by the Court of Appeals of Erie Railway Co. vs. Tompkins, Supra."

The Pennsylvania law is clear that where a pipe line or other device used for dispensing a dangerous substance malfunctions, investigation should at once be made, and if the cause cannot be readily ascertained the same should be retired from service until such time as a proper investigation discloses the cause of the failure, or at least the user of the equipment should be warned not to use it until the same is ascertained. See *Heller v. Equitable Gas Co.*, 333 Pa. 433, 3 A. (2d) 343 (1939), involving a gas leak in a home service line, where the court said:

> " . . . If defendant's employees had exercised the required diligence when they assumed to replace the leaking pipe, they would have remedied the condition themselves, or have warned plaintiff that he must do so, and discontinued service until the work was done, for primarily the burden rested upon the plaintiff to maintain the service line in good repair." 333 Pa. at 436-438.

See also *Goodman & Theise, Inc. v. Scranton Spring-Brook Water Service Co.*, 352 Pa. 488, 43 A. (2d) 111 (1945), *Pryor v. Chambersburg Oil and Gas Co.*, 376 Pa. 521, 103 A. (2d) 425 (1954), *Hemrock v. Peoples Natural Gas Co.*, 423 Pa. 259, 223 A. (2d) 687 (1966). The *Hemrock* case further holds that a gas company will not be heard to say that the danger was not apparent to its employees because it would have been found only if sufficient investigation and testing had been performed by persons of specialized knowledge in the area. See also *Griffin v. Atlantic Refining Co.*, 305 Pa. 386, 157 A. 791, holding that a gasoline supplier has a continuing duty to make sure its dispensing equipment is safe.

Both courts held that defendant, Humble, should be held to a high degree of care because its equipment dispensed a highly volatile and dangerous substance (Opinion, App. p. 111).

Admittedly no investigation was made by Humble as to the cause of the failure of April 20, 1964, nine days before the fire. Heckman 800a, 807a, 808a, 810a; Elmer, Jr., 955a-962a; Erdlac, 943a; Crankshaw, 656a, although Yellow Cab gave immediate notice of the first incident to Humble. Harper, 276a, 682a; Elmer, Sr., 478a, 486a; Elmer, Jr., 452a, 453a.

While the Court of Appeals assumes that the lower court was correct in its holding that investigation would not have disclosed the cause of the problem, the witnesses in the case testified that had an investigation been made, the investigation would have revealed the cause of the failure. Heckman, 800a-807a, 808a-810a; Elmer, Jr., 955a-962a; Erdlac, 943a; Crankshaw, 656a.

Furthermore, all witnesses, plaintiffs' and defendants' alike, agreed that a fracture of a casting was most unusual. Heckman, 809a; Fishburn, 1066a; Elmer, Sr., 480a; Walker, 171a; Donaldson, 442a, Erdlac, 937a.

Leakage of gasoline is a dangerous condition. Berger, 776a; Crankshaw, 541a, 542a; Horton, 681a. Those in the industry recognized that the fracture of a casting is a very unusual occurrence. Walker, 171a; Donaldson, 442a; Heckman, 812a.

Both courts apparently overlooked and failed to apply this important principle of Pennsylvania law, that the gasoline supplier must discover the cause of the leakage of the gasoline or retire the unit from service until the cause of the leak is discovered. The lower court held that failure to investigate was of no moment, because defendant, Humble, could not have discovered within nine days that a pull on the hose would build up terrific pressure sufficient to fracture the casting at the top of the pump (See R. p. 1192a). The Court of Appeals also failed to recognize this principle

and made the same grievous error in misinterpreting this principle of law, by saying that Humble could not reasonably have foreseen the happening of the second accident. The Court of Appeals said "to hold that the defendant should have known in 1964 the idiosyncracies of the flexsteel hose which were not discovered by experts until 1967, is to ignore the realities of the case . . . " (Opinion Court of Appeals, App. VII).

The Court of Appeals did cite *Hemrock v. Peoples Natural Gas Co.*, supra, *Pryor v. Chambersburg Oil and Gas Co.*, supra, and *Foley v. Pittsburgh Des Moines Co.*, 363 Pa. 1, 63 A. (2d) 517 (1949), but as standing for an entirely different principle, namely the high degree of care to which defendant, Humble, should be held because its equipment dispensed a highly volatile and dangerous substance (p. 3 of opinion, App. III).

In so disposing of the case, it is submitted that the Court of Appeals and the lower court both misapprehended the thrust of petitioner's argument to the effect that where an unusual malfunction such as this occurs, and all that is done by the supplier is to replace the fractured casting with another casting, without ascertaining the cause of the fracture, this is not an adequate investigation. If Humble did not know at that time what had caused the fracture, the unit should have been retired from service until the cause was determined, or the petitioners warned against using the equipment.

For these reasons we say that both the Court of Appeals and the District Court have failed to apply the proper Pennsylvania law to this case, and the writ should be granted to determine whether the court below failed to adhere to the doctrine of *Erie Railway Co. v. Tompkins*, supra.

II. *Failure to Apply Sec. 402a Restatement of Torts as Required by Pennsylvania Law*

Both the Court of Appeals and the District Court refused to apply Sec. 402a of the *Restatement of Torts* as

recently adopted as the law of Pennsylvania, by the Supreme Court of Pennsylvania, to this case. In so doing, they again failed to pay proper heed to the doctrine of *Erie Railway Co. v. Tompkins*, 304 U. S. 64, and 28 U. S. C. 1652.

In *Webb v. Zern*, 422 Pa. 424, 220 A. (2d) 853 (1966), the Supreme Court of Pennsylvania adopted the provisions of Sec. 402a of the *Restatement of Torts* as the law of Pennsylvania, providing for strict liability to one who sells a product in a defective condition, unreasonably dangerous to the user or consumer, or to his property.

Defendant, Humble, took the position that it was not a seller of the gasoline dispensing unit, including pump and hose, since it was only in the business of selling gasoline. It appeared that the cause of the fracture of the casting which resulted in gasoline being spewed over the floor of plaintiff's Speyer's premises, and the resulting fire, was the build up of tremendous internal pressures in the system, when the slightest pull occurred upon the hose attached to the dispensing unit. The hose was a Goodyear flexsteel hose, which had been attached in October 1963, six months before the fire, by Humble's agents. It was this hose, which when pulled suddenly compressed by reason of its wire braid construction, and built up a tremendous hydrostatic pressure which fractured the casting on top of the gasoline pump. This same thing had occurred nine days before the fire in question, but at that time the gasoline had been cleaned up without igniting. The pump in question, including its hose, was attached to a tank buried in the ground, which contained the gasoline, and through the pump the gasoline was dispensed by pumping through the hose, which in turn was equipped with a nozzle for running the gasoline into the tanks of plaintiff Yellow Cab's taxicabs. The pump was owned by defendant. Humble, which had assumed the duty of keeping it in repair, either by itself or through its agents.

While defendant, Humble, may not be in the business of selling gasoline pumps and hoses, nevertheless, it owned

this equipment and used the same for dispensing its gasoline to the plaintiff. The pump and hose were an integral and necessary part of the sale of gasoline to the plaintiff.

Sec. 402a, *Restatement of Torts* (2d), Comment h, provides:

> "No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container is itself dangerous, the product is sold in a defective condition. Thus a carbonated beverage in a bottle which is so weak or cracked, or jagged at the edges, or bottled under such excessive pressure that it may explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition. The container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle when he is handling it preparatory to consumption." Sec. 402a, comment h, at page 352.

This reasoning that the seller of the product is to be held strictly liable not only for defects in the product itself, but also in the container in which it is dispensed, was fully recognized by the Pennsylvania Supreme Court in *Webb v. Zern*, supra. In the *Webb* case we had a party injured when a beer keg from which he was drawing beer exploded. The injured party brought suit against the distributor, the brewer who had filled the keg, and the manufacturer of the keg, and the Supreme Court held that these facts made out a case for strict liability under 402a, against all parties. The facts relative to this matter are more detailed in the decision of the lower court, the Court of Common Pleas of Lancaster County, Pennsylvania, subsequent to the decision of the Supreme Court, wherein it was

stated: (see p. 18 of Brief of Appellants in the Court of Appeals)

> "The defendants, Zern and Yuengling, next argue that they are not proper defendants under section 402a since they did not sell the beer keg which exploded. Admittedly title to the keg remained in Yuengling and never passed either to Zern nor to the plaintiff's father. However, Zern and Yuengling did sell beer and, of necessity, it must have been and was sold in a container, Comment h states, 'No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container itself is dangerous, the product is sold in a defective condition. The container cannot logically be separated from the contents when the two are sold as a unit'."

It will be noted that in *Webb against Zern*, the Supreme Court of Pennsylvania applied the strict liability doctrine to the container as well as to the product (beer) which the seller was selling. In the instant case we submit that the doctrine of strict liability should be applied not only to the gasoline which defendant, Humble, was selling to plaintiff, Yellow Cab, but also to the container through which it was dispensed, viz., the tank, pump and hose which were the property of Humble. We see no reason to distinguish between a beer keg, its pump and coils and a gasoline pump and hose. In either case the dispensing unit is necessary in order to effect the sale of the product. Beer cannot be sold to a customer except in a keg with a pump, and perhaps coils attached, or in a bottle or can. Certainly all these containers necessary to the sale fall within the strict liability rule of *Webb v. Zern*, supra.

By the same token, in order to effect a sale of gasoline for use in motor vehicles, it is necessary to convey the gasoline from the tank in the ground to the tank on the motor

vehicle, and this can only be done by means of a pump, hose, and nozzle, or possibly if conveyed by gravity by a mere hose and nozzle. It is also possible, of course, to pump the gasoline into a can and carry the can to the tank, but in each case a container is necessary to get the gasoline into the tank of the vehicle, and these containers should be treated in the same manner as was the beer keg in *Webb v. Zern*, supra.

The Court of Appeals, however, has refused to apply Pennsylvania law in this respect, and has refused to extend the doctrine of strict liability of the seller of the substance to the container of the dispensing unit in which it is delivered to the consumer. The Court of Appeals (App. IX and X) goes off on the theory that the beer consumer purchases the container as well as the beer. In the case of the purchaser of beer in *Webb v. Zern*, this was not true, because the keg and tapping apparatus were owned by the seller of the beer, who retained title to them. The same situation is present here where the gasoline dispensing unit in this case was owned by Humble, which retained title to it, and assumed the duty of keeping it in repair.

The Court of Appeals really did not answer this argument, but merely brushed it off with the statement (App. X):

> "We resist the inescapable conclusion to plaintiffs' argument that gasoline is packaged and marketed in pumps."

It seems to us that such a statement flies directly in the face of all human experience of which judicial notice can be taken in this age of automobiles. Gasoline is a liquid which can only be dispensed in the manner above set forth. It is submitted in each case these are the containers which are necessary to dispense it.

For the above reasons it is submitted that the Court of Appeals and the lower court failed to give due weight to the law of Pennsylvania as enunciated by the Pennsyl-

vania Supreme Court in *Webb v. Zern*, supra, and in so doing failed to apply 28 U. S. C. 1652 and the doctrine of *Erie Railway Co. v. Tompkins*, 304 U. S. 64.

III. *Unfair Result of Pretrial Procedures*

The pretrial procedures adopted by the District Court in this case resulted in giving the defendants an unfair advantage and in distortion of the procedures for pretrial, as prescribed by Rule 16 of the Federal Rules of Civil Procedure, and as supplemented by Rule 5 of the Rules of the United States District Court for the Western District of Pennsylvania. The facts are that the District Court on December 29, 1966 fixed April 3, 1967 as the time for commencement of the non-jury trial in this case, and at that time directed plaintiffs to file a pretrial narrative statement on or before January 20, 1967 (see R. 60a). The pretrial narrative statement was actually filed after extensions, February 3, 1967. Nothing was contained in this order requiring the defendants to file a pretrial narrative statement setting forth the basis of their defense. At the conclusion of plaintiffs' case on April 7, 1967, the Court indicated that defendants were to file their pretrial statements by May 1, 1967, which would be prior to the resumption of the proceedings on May 10, 1967 (See R 71a, 72a). As the result, plaintiffs filed a motion to require earlier filing of pretrial statements by the defendant (R 71a), but defendant, Humble, did not file its pretrial narrative statement until April 26, 1967, and defendant, A. O. Smith, did not file its pretrial statement, including a list of 24 witnesses (R 89a) until May 5, 1967. Experts' reports were not furnished with the pretrial statement. It was, of course, impossible to interview or depose this number of witnesses prior to the resumption of the trial on May 10, 1967. Plaintiffs had attempted in their motion at 71a, filed April 17, 1967, to require defendant, Humble, to file a pretrial statement on or before April 20, 1967, but noth-

ing was accomplished, and the reports of the experts were not submitted to plaintiffs' counsel until the morning of May 10, 1967, when the trial resumed with defendants' testimony. As set forth in plaintiffs' motion (R 71a) it appears (R 72a) that as early as January 1, 1967, defendant, Humble, had solved the problem of causation of the fire and had determined the evidence it had to support its theories as to the cause of the fire. It appears from the testimony that as early as December and down through the ensuing months, defendant, Humble, two and one-half years after the fire had finally begun to investigate the cause of the fracture of the casting, and had determined it was the result of a pull on the Goodyear flexsteel hose, which it had attached to the pump. All these facts were kept from plaintiffs' counsel until just before the resumption of the trial on May 10, 1967.

We say that the result of this was a perversion and distortion of pretrial procedures under Rule 16, which are designed to prevent surprise and to apprise each party of the evidence to be adduced by his opponent. The procedure followed by the District Court in this case, to-wit, requiring plaintiffs to file a pretrial narrative statement two months in advance of trial, hearing plaintiffs' case, suspending the hearings for a month, and not requiring the defendants to file a pretrial narrative statement until just before the resumption of trial resulted in basic unfairness and hampering of plaintiffs' preparation for trial. The procedures effectively prevented plaintiffs and their experts from engaging in a timely review of the reports and tests, from determining the validity of the tests performed by defendants' experts, and from preparing effective rebuttal. The plaintiffs were placed in a position of jeopardy as far as preparation was concerned, and were deprived of due process.

Rule 16 of the Federal Rules of Civil Procedure provides for pretrial procedures covering matters therein set forth, including simplification of the issues, and provides

for a pretrial order limiting the issues for trial, to those not disposed of by admission or agreement of counsel. The purpose of pretrial procedures is to compel disclosure of issues, evidence and position of the adversaries. As stated in Barron and Holtzoff, *Federal Practice and Procedure* (1960 Edition to Pocket Parts), pretrial procedure is

> " . . . however useful and appropriate *to compel a complete disclosure* of claims and defenses and to ascertain what the actual controversy is . . . " (Emphasis supplied.)

See *Blanken v. Bechtel Properties, Inc.* (1961) 194 F. Supp. 638, affirmed 299 F. (2d) 928.

The United States District Court for the Western District of Pennsylvania in its rule on pretrial procedure has supplemented, refined and particularized the scope of Rule 16 of the Federal Rules of Civil Procedure. The rules adopted by the Western District of Pennsylvania provide that when a case is placed upon the pretrial civil jury list all discovery shall be completed within fifty days. Within 60 days counsel for plaintiff shall serve a narrative written statement of the facts, including the attachment of *copies of all reports containing findings or conclusions of any expert who has been consulted in connection with the matters involved in the case and whom a party expects to call as witness for trial* (see App. p. ———). (Emphasis supplied.) Within 70 days the defendant shall likewise file a narrative statement with copies of the reports of his experts. After all pretrial narrative statements are filed, a pretrial conference is scheduled. The same rules apply to nonjury cases. In Rule 5 II (b) it is provided:

> "Nonjury trial shall be pretried in accordance with an order by the Judge to whom the case has been assigned."

In a nonjury trial the detailed procedures relative to pretrial narrative statements in jury trial should be followed.

The procedure in both jury and nonjury cases should be similar. The nonjury procedure should not be employed as to result in basic unfairness to a party as resulted here. Plaintiff should not be required to file a pretrial narrative statement with the reports of all witnesses in advance of trial, then ordered to trial, place all of plaintiffs' evidence in the record, then have the case suspended for a month without requiring the defendants to submit pretrial narrative statements until just before the resumption of trial, or to submit the reports of defendants' experts until the morning trial begins. If this is proper under Rule 5 II (b) for nonjury cases in the Western District of Pennsylvania, this rule is void for vagueness in not setting up any standards to guide the discretion of the Judge in entering such orders. Such a use of pretrial procedure is basically unfair to plaintiffs and makes a mockery of sound judicial administration.

The procedure adopted by the Trial Judge was particularly unfair here, where one of plaintiffs' basic contentions was that defendant, Humble, failed to make any tests at all to determine the cause of the failure of the casting which caused the first gasoline spillage on April 20, 1964. Plaintiffs also contended that defendant, Humble, failed to maintain the pump properly. Humble's tests proved to the satisfaction of the Trial Judge that the casting would have been fractured even in the event of proper maintenance, and therefore Humble was not negligent. If the Court had applied Pennsylvania law with respect to the duty of the supplier of gasoline to retire the pump from service, if the supplier did not know, nor make any determination of the cause of the fracture, possibly no harm would have resulted. However, the court refused to apply such law, and plaintiffs were unable to refute or rebut the inferences drawn from the tests made by Humble. Plaintiffs had no time to conduct alternative tests to dispute the validity of the test procedures or the results of the tests.

Furthermore the delay in hearing the defendants' evidence was also prejudicial. There should be no reason why nonjury pretrial and trial procedures should differ materially from those required in jury cases. The delay in hearing defendants' case after all of the evidence of plaintiffs' case was placed on the record, gave the defendants unfair advantage even in this nonjury case. Judges' memories are no more infallible than jurors' memories. In a jury case a delay such as that which occurred in this case has been held to be prejudicial.

In *Carl D. Citron v. Aro Corporation*, 377 F. (2d) 750, certiorari denied 389 U. S. 973, 88 S. Ct. Reporter 473, a two and one-half week intermission between the close of plaintiff's case and the beginning of the defendant's case was held to be prejudicial to the plaintiff.

The court held that the trial was conducted in a manner which in its ultimate effect was distinctly favorable to the defendant and decidedly unfavorable to the plaintiff. This is exactly the situation which resulted in the conduct of the Trial Judge in delaying the case and not requiring defendants' pretrial statements to be filed until the defendants' cases were presented. Such an error is related to the substantial rights of the plaintiff and a demonstration of prejudice is not required. The court further said:

> "(3) Since the error was one related to the substantial rights of the plaintiff, and prejudice was clearly within the range of possibility, a demonstration of prejudice was not required. Snyder v. Lehigh Valley Railroad Company 245 F. 2d 112, 115, (3rd Cir. 1957). It is the settled rule that an error 'which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial.' McCandless v. United States, 298 U. S. 342, 347, 348, 56 S. Ct. 764, 766, 80 L. Ed. 1205 (1936) and the cases therein

cited; Sears v. Southern Pacific Company, 313 F. 2d 498, 503 (9th Cir. 1963). It did not so appear in the instant case."

Clearly the conduct of the Trial Judge in this case was prejudicial and deprived the parties plaintiff of substantial rights.

Conclusion

For the foregoing reasons, petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

KNOX, GRAHAM, PEARSON & MCLAUGHLIN

By: WILLIAM W. KNOX

QUINN, PLATE, GENT, BUSECK & LEEMHUIS

By: JOHN G. GENT

APPENDIX A

Opinion of the United States District Court for the Western District of Pennsylvania

WILLSON, J., *District Judge*

Henry W. Buhl has been engaged in the taxicab business in the City of Erie in this District since 1935. Under the Public Utility Laws of Pennsylvania, he operates Yellow taxicabs. But to garage and to maintain his cabs, he formed the corporation, plaintiff Speyer, which owns the building. The cab business is owned by plaintiff Yellow Cab. Mr. Buhl owns all of the stock of both corporations except for nominal shares, and was and is the force behind the operation of both plaintiffs.

On April 24, 1964 a disastrous gasoline fire occurred on plaintiff's premises which destroyed the building and over 65 taxicabs as well. Suit was filed on December 31, 1964. The diversity jurisdiction of the Court was invoked. The case came on for disposition non-jury. Throughout the pretrial stages, the issues appeared complex. Some 8 hearings were had on discovery and other motions prior to trial. Several third party defendants were added of record. However, it was decided that the issue of liability only against Humble and A. O. Smith should first be tried. During a 12 day trial some 2,063 pages of testimony were taken and transcribed. It is believed that a recital of but the essential facts which appear in this extensive record is necessary to an understanding of the case and greatly simplifies it.

In the mid-1940's, plaintiff Speyer purchased a building at 117 East Tenth Street in Erie, and in consultation with the architects and builders the management of Speyer remodeled that building, including the installation of a wall at the proposed location of a gasoline pump. Humble had nothing whatever to do with this remodeling. After this remodeling, Yellow Cab began to utilize that building as a garage for its taxicab operation.

Humble is a major supplier of gasoline and oil products and does business in the Erie, Pennsylvania area. For some time prior to April 1954 when Humble lost the Yellow Cab account to Cemico, Humble furnished gasoline to Yellow Cab at the plaintiffs' garage.

After Cemico started to supply gasoline to the plaintiff enterprise, Cemico in April 1954 purchased from Erie Meter Systems and installed in the plaintiffs' garage a #910 pump.

The Erie pump was selected by J. T. Harper, the President of Yellow Cab, and Humble had nothing whatever to do with its selection, purchase or installation. Installation of the Erie pump was on the east side of a wall located inside the garage which had been constructed by the plaintiff enterprise as a part of the remodeling previously referred to. A pipe extended from the pump and through this wall to the west side thereof, where a gasoline hose and nozzle used to dispense the product was located. The Erie pump was leased by Cemico to the Yellow Cab following its installation in April 1954.

On October 1, 1955, Yellow Cab changed its source of gasoline back to Humble. Yellow Cab purchased from Cemico the gasoline dispensing equipment, including the Erie pump, used to store and dispense gasoline at the plaintiffs' garage. Humble as an accommodation to the business purchased this equipment from Yellow Cab and leased it back under an Equipment Lease dated November 1, 1955. No rental was paid under this Equipment Lease.

That Equipment Lease contained a provision under which Humble agreed to make certain repairs to the leased equipment upon written notice from the plaintiff enterprise and upon certain other conditions. Prior to 1959, those repairs were made either by Humble employees or independent service contractors, including Jabe, hired by Humble from time to time on a specific request basis.

Then in 1959 Humble entered into an Area Maintenance Agreement with Jabe. Jabe was the best pump service contractor in the Erie area and the contractor who

for several years had made repairs to the service station equipment, including gasoline pumps, for Humble under a Contract Mechanics Specific Request Agreement, at service stations selling, and at customer locations using Humble gasoline and other petroleum products. Among the equipment to be serviced by Jabe under this agreement was the gasoline dispensing equipment, including the Erie pump, located at the plaintiffs' garage. Jabe pursuant to its agreements with Humble made numerous service calls to the plaintiffs' garage repairing damage to the pumps and inspecting them. The evidence showed that for several years from time to time the hoses attached to the gasoline pumps became damaged. The damage occurred because of the method of operation by Yellow Cab employees. The routine followed was that an incoming driver going off duty filled the tank of his cab with gas prior to checking in his cab fare and quitting his shift. But plaintiffs employed no attendants to fill gasoline tanks of the cabs. Each driver performed this task for his cab. The cabs came off the street at 8 hour intervals and lined up at pump or pumps awaiting their respective turn at the pump. Hose trouble frequently occurred because the drivers would drive off with the nozzle of the hose still in the tank thus stretching and pulling the hose and occasionally catching the hose on bumpers of the cabs. Humble through Jabe made the repairs when necessary and when called upon by Yellow Cab. Finally in October 1963, Jabe installed on the Erie pump a Flexsteel hose manufactured by Goodyear. This hose, which had Underwriters' Laboratories approval was used by Jabe only at problem locations where a heavy duty hose was needed or requested by a customer. This hose was made of a steel, wire-braid construction. Several companies other than Goodyear, including U. S. Rubber and B. F. Goodrich, have manufactured and marketed a similar gasoline hose for many years. This type of gasoline hose was first approved by Underwriters' Laboratories in 1957 and the Goodyear Flexsteel brand of this hose was initially approved in early 1960.

On April 20, 1964, a cab driven by Arthur Locke, a Yellow Cab driver, after refueling at the Erie pump and in maneuvering to go up a ramp, hooked the hanging hose of the Erie pump with the cab bumper and pulled and stretched the hose as the cab was driven away. Shortly thereafter, gasoline was observed on the floor of the Yellow Cab garage. The gasoline was promptly cleaned up and no fire ensued. Inspection of the Erie pump by Yellow Cab personnel revealed that the meter cover casting, located inside the Erie pump, was cracked. Yellow Cab shut down the Erie pump, removed it from operation and called Jabe. The following morning, John Elmer, Jr., of Jabe, made the necessary repairs by replacing the entire meter unit, including the meter cover casting, of the Erie pump. Mr. Elmer, Jr., then made the usual inspection and operating tests on the Erie pump, which showed that the valves of the pump were clean and operating properly; that the other parts of the pump were operating properly; and that the pump was not leaking gasoline. Thereafter, the Erie pump was placed back in operation, and it worked properly until the incident eight days later.

On April 29, 1964 a cab driver named Charles Southward, after completing his work shift, pulled up to the Erie pump to refuel his cab. To do this, Southward placed the nozzle of the hose in the gasoline filler pipe of the cab and "hooked it in" so that it would not fall out of the tank. An advertising sign was mounted on the rear of the cab with the bottom of the sign below the level of the filler pipe. Consequently, it was necessary for Southward to move the sign in order to insert the nozzle in the filler pipe of the cab. After inserting the nozzle, Southward, following the practice of all of the drivers, hooked the nozzle in the tank by placing the ad sign on top of the nozzle and perhaps by some other method. Southward then worked on his report inside his cab while the refueling proceeded. Southward was in a hurry to leave since he had a date and wanted to get a "quick beer". In any event, when the nozzle shut off, he forgot to remove it from the tank and drove off

several car lengths with the nozzle in the tank, stretching the hose tight and giving it a violent jerk. This jerk was sufficient to severely distort in the direction of the pull, the pipe coupling to which the hose was attached.

Although the nozzle was automatic in that it shut off the flow of gas when the tank became filled, thereby allowing the driver to leave the vicinity of the tank while refueling, the nozzle had a spout without any spring or other device on it which would permit it to remain in the filler pipe without some external retaining force. Defendants contend that the drivers hooked the advertising sign over the nozzle to keep the spout in the filler pipe of the gas tank. Plaintiffs deny this practice. There is considerable uncertainty in the record as to the component parts of the nozzle which were attached to the hose on April 29th, as this nozzle was not found after the fire. However, the evidence favors defendants' contention.

Despite the fact that most of the employees of Yellow Cab who witnessed this incident on April 29th were aware of the Locke incident of April 20th and the damage it had done to the pump, and the gasoline leakage which had then occurred, no one took a look at the Erie pump after the Southward incident to see if it had been damaged or if it was leaking gasoline. Instead, another driver, named Lee, who, at the time Southward was refueling, was awaiting immediately behind Southward to refuel and who had observed the hose being jerked by Southward driving away with the hose in the tank of his cab, pulled his cab along the Erie pump, turned the pump on and placed the nozzle into the tank of his cab, putting the nozzle on the automatic position. After the pump had been running for 3 or 4 minutes, although it was not delivering gasoline to Mr. Lee's cab, another Yellow Cab employee, Charles Siebold, chanced by the Erie pump and discovered gasoline on the floor in the vicinity of the pump. He then shouted a warning; but before effective action could be taken, the gasoline ignited and the subsequent fire damaged or destroyed physical and real property located at the garage.

After the fire, a crack was noted in the meter cover casting which had been installed on the Erie pump on April 21, 1964, by John Elmer, Jr. This crack was similar in appearance to that found in the meter cover casting involved in the April 20, 1964 incident.

Alleged Negligence of Defendant Humble

There is no divergence of opinion between the parties as to how the accident happened. As plaintiffs state in their post-trial brief,—"All parties to this case agree that internal pressure was created in the system and that the system, on the date of the accident, was incapable of relieving the pressure." However, this seeming concord on the *how* of the accident merely points up the great dispute on the *why* of the accident. From the outset of litigation, and throughout their portion of the trial, plaintiffs contended that the pressure build-up was caused by a malfunctioning pressure relief valve and that this in turn was the result of improper maintenance by Humble. Plaintiffs' expert, John Crankshaw, expressed this opinion in his testimony and explained the basis for it as follows. The meter head casting was of Class 15 or Class 20 cast iron, which had a tensile strength of 15,000 or 280,000 psi respectively. The static pressure required to fracture a casting under laboratory conditions was approximately 500 psi. Similarly, under laboratory conditions, with the pressure relief valve rendered inoperative, pressures of the magnitude of 150-175 psi could be obtained in the meter head by rapidly opening and closing the hose nozzle valve. Since the gaskets in the pump assembly would leak at 250 psi or less, Mr. Crankshaw reasoned that the meter head casting fracture was not the result of any single pressure surge, but was rather the result of material fatigue, i.e., the cumulative result of numerous repetitive pressure surges. Using stress analysis to explain the material fatigue theory of the casting fracture, Mr. Crankshaw explained that the cast iron of the type used in the casting, had an endurance limit of

8,000 psi, that is, it could withstand repeated stresses of that magnitude without ultimately failing, but if a stress greater than that were produced, the number of times it could be produced without resulting in material failure would be finite and the casing would ultimately fracture. Taking the surge pressures of 100-175 psi, Mr. Crankshaw computed the resulting stress to be 4000-7000 psi, or in surges, double that or 8000-14000 psi, beyond the endurance limit. Since pressures of the magnitude of 100-175 psi were impossible to obtain under normal operating conditions with all relief valves functioning properly, and since such pressures could be obtained could be obtained by rendering the relief valves inoperative, Mr. Crankshaw concluded that the casting was fractured because the relief valves were inoperative, and that they were inoperative because of accumulations of foreign materials which proper maintenance would have prevented.

Mr. Crankshaw's testimony in chief was impressive and convincing in its application of engineering principles to the facts of the case. Had this been all that there was to the case, the effect of it would have tended toward imposing liability upon Humble for improper maintenance. However, after persistent and exhaustive cross-examination had been conducted by Humble's counsel, this Court was left with two impressions: first, that the engineering bases for plaintiffs' theory of liability were not as bedrock sound as they first appeared, and second, that defendants were not going to be content merely with refusing plaintiffs' theory but were prepared to propose a theory of their own. In short, had the plaintiffs' case depended solely on their evidence, this Court would have found difficulty in rendering a judgment in their favor.

Defendants' theory of the case rests upon a fact given little weight by the plaintiffs. Noting that preceding each instance of casting fracture, the hose had been subjected to a violent jerk, Humble formulated the theory that it was the jerk, and not the inoperative valves, which caused the casting fractures. Using a pumping assembly and pip-

ing constructed to simulate the conditions which obtained at the Yellow Cab garage, defendants demonstrated to the Court that even in a properly maintained and cleaned pumping assembly, with all valves thereby presumably operative, the meter head casting could be fractured simply by having a man stretch the hose to its full length and give it a sharp jerk. Defendants' experts explained this phenomenon by reference to the physical characteristics of the hose installed on the pump at the Yellow Cab garage and at the demonstrations. The hose, a Goodyear Flexsteel brand, is constructed of wire braid encased in rubber, which gives it greater strength and resistance to crushing, as when driven over by an automobile. As indicated, defendants' witnesses testified that this hose had been installed on the pump at the Yellow Cab garage because the abuse given other hoses had resulted in their being crushed and unsuitable for use. A peculiar characteristic of this hose, however, defendants' experts testified, was that because of the wire mesh construction, the bore of the hose, when stretched, tended to decrease at a rate greater than the length increased, resulting in a sharp reduction of volume and corresponding sharp increase in pressure, which, when transmitted back along the pipe to the meter head casting, caused the fracture.

Defendants' evidence tended strongly to exonerate them of any negligence based on improper maintenance. The demonstrations, while not conclusively establishing the cause of the casting fracture which precipitated the fire, are more persuasive than plaintiffs' theory, unsupported as it was by any evidence that the valves in fact were inoperative because clogged, and questioned as it was by defendants' undercutting its engineering soundness. The contention of the defendants, that the fracture was caused by a sudden jerk on the hose and could be caused thereby even under optimum working conditions, is entitled to more credibility and hence to be accorded more weight in formulating the decision of this Court. Plaintiffs' argument, that if a casting in a properly maintained pump could be

fractured by a jerk, a casting in an improperly maintained pump could be fractured more easily, assumes its conclusion and is at any rate speculative. It is the finding of this Court, based on all the evidence, that plaintiffs have failed to meet their burden of proof on the issue of Humble's negligence based on improper maintenance.

At this juncture, plaintiffs have chosen to adopt another theory of negligence and base their theory on all the evidence, including defendants', as it is their right so to do. Under this theory of negligence, plaintiffs contend that Humble was negligent in installing a Flexsteel hose on the pump when it knew or should have known of the probable consequences of such an installation. They argue that the tendency of the hose bore to decrease sharply and the internal pressure to increase correspondingly when the hose was jerked created an unsafe condition which would have become evident had Humble adequately tested such an assembly before authorizing the installation of the Flexsteel hose on the pump at the Yellow Cab garage. The answer to this argument lies in a consideration of the duty of Humble to exercise a reasonable degree of care in its maintenance of the gasoline pump on the plaintiffs' premises. Testimony showed the following: The pump and the meter assembly was of a type which had been manufactured and in use throughout the industry since the 1930's. Underwriters' Laboratories approval had been given to this type of assembly from the beginning. The Flexsteel hose, manufactured by a large and reputable concern, was of a type first approved by Underwriters' Laboratories for installation on gasoline pumps in 1957 and had been on the market in Erie since 1960 or 1961. Jabe Construction and Equipment Company, the contractor retained by Humble for maintenance of pumps at locations selling or using its petroleum products, reputedly had the most competent service staff in the area, and had been similarly retained by other major oil companies. The question then refines itself to this: Considering the physical properties of Flexsteel hose, and given the possibility that a driver might pull away from

the pump while the hose nozzle was still in the filler pipe of his car, could Humble reasonably be expected to foresee the probability of such a driving away with the consequent jerk, reduction in bore, increase in pressure and meter head fracture? The answer to this question in this case must be negative. Nor do the instances, real or otherwise, of motorists pulling away from service stations with the nozzle still in the filler pipe, avail the plaintiffs in this matter of foreseeability, for they deal with situations where there is an attendant, i.e., where the person who does the driving away is not the person whose business it is to mind the nozzle, as was the case at the Yellow Cab garage.

Nor can it be said that the happening of a similar casting fracture, ten days before the accident, is sufficient to put Humble on notice of the potential danger of the installation. There has been no showing that such a danger could have been discerned within that time—in fact, the possibility of a causal relationship between the hose and the facture was one which was discounted by plaintiffs' expert until seeing the demonstration.

On the basis of all the evidence, it is again clear that plaintiffs have failed to meet the burden of proof required to establish the liability of Humble based on negligence in supplying a hose for the pumping unit at the Yellow Cab garage.

Strict Liability

As an alternate ground of recovery, plaintiffs contend that defendants are liable under the rule of strict liability announced in Section 402 A of the Restatement of Torts, Second, which was adopted by the Supreme Court of Pennsylvania in *Webb v. Zern*, 422 Pa. 424 (1966). Briefly stated, Section 402 A imposes liability upon a seller for damage caused by a product sold—"in a defective condition unreasonably dangerous"—to the user's property even though the seller—"has exercised all possible care in the preparation and sale of his product." The *Webb* case applied Section 402 A to impose liability upon a beer distributor for

personal injury damages suffered when a beer keg exploded. Plaintiffs contend that the gasoline pump assembly, although merely a conduit through which the gasoline sold them by Humble passed, is analogous to the keg in the *Webb* case, and/or was a "container" within the meaning of Comment h to Section 402 A. Additionally, plaintiffs assert that Humble is liable under Section 402 A as the supplier of the pump assembly, including the hose.

The last assertion will be disposed of first, so that those preceding it can be considered in more detail. Section 402 A is applicable, by its very terms, to *sellers*. Since the Restatement provides rules for lessors of chattels at Sections 407 and 408, and makes no mention of lessors in Section 402 A, it is apparent that this section is not intended to be applied to any but sellers. It is stated plainly in Comment f:—

> "The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption."

The evidence showed that Humble was not in the business of selling pumps. It showed, to the contrary, that the pump in question was purchased by plaintiffs from Cemico and sold, still in place, to Humble who then leased it to plaintiffs. To find Humble liable under Section 402 A because it furnished the pump assembly would thus be contrary to both the law and the facts of the case.

To return to the container theory of liability under Section 402 A: It clearly appears from the cases cited by plaintiffs under this theory that the containers and the things contained were, in the words of Comment h,—"an integrated whole," which had proceeded from manufacturer to consumer as a "unit."

Ordinarily, this Court might be reluctant to extend the container theory to a conduit, but in this instance, such an extension is not necessary, for even if it were made, plaintiffs still would not, on the basis of all the evidence, be entitled to recover under the rule of Section 402 A.

Comment h to Section 402 A begins: —

> "A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . the seller is not liable."

The comment continues: —

> "Where, however [the seller] has reason to anticipate that danger may result from a particular use, he may be required to give adequate warning of the danger."

That the pump and hose were safe for normal handling is borne out by the evidence that in the many years pumps of this type had been in operation, and in the several years hoses of this type had been in use, no casting fracture had been reported. Similarly, that the damage resulted from abnormal handling is borne out by the evidence that the casting fracture was caused by the jerk on the hose by the cab driving away with the nozzle in the filler pipe. Plaintiffs, however, would make much of the requirement of adequate warning set forth in the quoted portion of Comment h, and assert that the pump assembly was defective, despite their abnormal handling of it, because defendants failed to warn them of the dangers inherent in such handling. The weakness of this assertion is pointed up by the language of Comment j, concerning warnings: —

> "But a seller is not required to warn with respect to products . . . when the danger, or potentiality of danger, is generally known and recognized."

Plaintiffs have argued in this regard that although they knew or should have known that hose jerking might produce hose failure, they did not and could not have known that it would produce pump failure, and that therefore their knowledge as to the former did not relieve defendants of the responsibility to warn as to the latter. However, this characterization is faulty, for the plaintiffs, having knowledge of

the general danger, cannot be exculpated on the grounds that they were not warned of the specific danger.

Moreover, the language—"where . . . [the seller] has reason to anticipate that danger may result from a particular use,"—interjects the concept of foreseeability into defendants' duty to warn. Foreseeability deals with the reasonably probable, not the possible, and does not extend to the negligence of others. It would be unrealistic to hold defendants responsible to foresee the possibility that the same driver who places the nozzle in the filler pipe in such a manner that it will not fall out, will subsequently drive off without first removing the nozzle. Upon a consideration of all the evidence in the case, it must be said that plaintiffs have failed to establish the liability of defendants under Section 402 A.

Case Against A. O. Smith

Aside from what has been said in plaintiffs' case against both defendants, plaintiffs have brought this action against A. O. Smith individually on several theories: — warranty, negligence, and presumably, strict liability. However, all fail. Smith's defense, that it is not responsible for the negligence or breach of warranty of its corporate predecessor who manufactured the pumping unit, need not be considered in view of the dceision reached on the merits.

The pumping unit in question was built by Erie Meter Systems, Inc., in 1954. It incorporated a type of meter which had been in successful use since the 1930's. Both the pumping unit and all its components had received Underwriters' Laboratories approval. The components, such as the pump and air eliminator, had been used by other manufacturers as well as Erie for many years without complaints. The pumping unit in question had functioned well at the Yellow Cab garage for almost 10 years prior to the fire. The pump and components were designed to operate at about 50 pounds maximum pressure; the materials used in construction were designed to withstand much greater pressures, and apparently did withstand such pressures.

Mr. Crankshaw, plaintiffs' expert testified that it required 250 pounds pressure to cause the gaskets to leak, and about 500 pounds pressure to fracture the meter head casting. It is apparent that Erie was extremely conservative in the design and construction of its pumping unit, and hence cannot be found liable in this regard.

As for liability predicated upon the failure of Erie, or A. O. Smith, to foresee the danger attendant upon the use of the Flexsteel hose, it is sufficient to state that such a duty is unreasonable and far-fetched. It must be noted that the type of pump had been on the market for several years without complaints, and that it and its components as well as the hose had been approved by the major independent testing laboratory. To require a manufacturer of a product which has been demonstrably safe, to consider and test every conceivable attachment which might be used in conjunction with that product, especially when the attachment had already been tested and certified by an independent agency, is unreasonably burdensome and is not required by law.

With respect to strict liability, what was written with respect to Humble is applicable here. Abnormal handling and the unforeseeability thereof completely exonerate A. O. Smith from liability in this regard.

This Court finds no basis for the imposition of liability upon A. O. Smith for the fire which occurred at the Yellow Cab garage.

Negligence of Plaintiffs

Defendants have contended that Speyer and Yellow Cab were parts of a unitary enterprise, so that any negligence of an employee of Yellow Cab would be imputable to Speyer. The evidence showed that Henry W. Buhl was the owner of the stock of both corporations. Testimony showed that the predecessor of Yellow Cab, Checker Cab, both conducted the taxicab business and owned the building from which it was conducted, the building destroyed in the

fire. In 1948, Speyer was organized and bought the building from Checker Cab and leased it back to Checker, which some time thereafter changed its name to Yellow Cab. Speyer's sole asset was the building. This sale of the building was carried out, Mr. Buhl testified, for business reasons, because the taxicab company, as a public utility, could not sell real estate without the permission of the Pennsylvania Public Utility Commission. Since 1948, Mr. Buhl, when in Erie, actively participated in the management of Yellow Cab, a fact which was not disclosed until late in the trial. In his testimony during plaintiffs' portion of the case, Mr. Buhl professed to know very little of the operations of Yellow Cab; later, when it became apparent that the tide was not running in their favor, Mr. Buhl demonstrated a remarkable acquaintance with the details of the business. There was little other business for Speyer than acting as "landlord" to Yellow Cab. Speyer had no office of its own, maintaind no ledgers or books of original entry, and was served by the same accountants as Yellow Cab. Mr. Harper, the president of Yellow Cab, performed many duties for Speyer, and at times when Mr. Buhl was out of town, was the only person who could act for Speyer. In addition, rental adjustments and intercompany loans indicate that the two plaintiffs were anything but the discrete organizations claimed by plaintiffs. On the basis of this evidence, this Court has no difficulty in finding that the two plaintiffs — Speyer, Inc. and Yellow Cab — were parts of a unitary business enterprise owned and controlled by Henry W. Buhl for purposes of engaging in the taxicab business in Erie. Mr. Buhl was in command of the business operated by Speyer as well as the taxicab business. It is true that Mr. Harper was president, but Mr. Buhl was the boss. He knew all about the installation of the advertising signs on the back of the cabs. He knew all about the various nozzles and where they were purchased. He was aware at all times of the practice in refueling the cabs. He was aware of the trouble Yellow Cab had with various types of

gasoline hoses. It is true he was away from the city at times, but nevertheless was the active head of the business of both plaintiffs.

The negligence, if any, of an employee of Yellow Cab is therefore imputable to Speyer.

The evidence clearly establishes that the meter casting fracture was caused by the jerk given the hose when one of Yellow Cab's employees drove away from the pump without removing the nozzle from the filler pipe of his cab. The evidence also establishes that a jerk of at least 175 pounds is required to fracture a casting. The only type of automatic nozzles approved for use by Underwriters' Laboratories feature break-away spouts which shear off at a 150 pounds or less pull. The inference then is justified that the nozzle in question either did not have a break-away spout, or if it did have one, was in such a position or was so attached to the cab that the break-away feature was in effect subverted. The furnishing and maintenance of nozzles was the responsibility of Yellow Cab. There is evidence that Yellow Cab had purchased non-break-away spouts and latch kits (which would be used to convert the old-style, non-automatic nozzles to automatic nozzles); if used together, the resulting nozzle would not be approved by either Underwriters' Laboratories or by the Commonwealth of Pennsylvania. There was evidence that the spouts were permitted to become loose and could be rotated ninety degrees from the position in which the break-away feature was effective. There was evidence that the drivers would "lock" the nozzle into the filler pipe by placing the advertising sign on top of the nozzle. The nozzle which was on the pump preceding the fire apparently was not found in the debris, for it was not introduced into evidence; its condition when the cab driver pulled away with it in the filler pipe thus remains, on the basis of the evidence, little more than conjecture, as does the matter of whether or not it was somehow "locked" into the filler pipe. Even so, on the basis of the evidence, it is clear that the nozzle did remain

in the filler pipe and that the hose was rapidly pulled out to its full length when the cab was driven away.

On this basis then is the negligence of plaintiffs irrefutably established: the failure of the driver whose duty it was to remove the nozzle from the filler pipe before driving away from the pump, so to do. Nor is it a defense to argue as plaintiffs do, that he could not have been aware of the exact nature of the danger involved; it is sufficient that he be, or should be, reasonably aware that the natural consequences of his act be dangerous. This Court has no difficulty in finding that plaintiffs, through the actions of their driver in pulling away from the pump without removing the nozzle from filler pipe of his cab, were negligent, and that such negligence was the proximate cause of the fire.

Indemnity

The Equipment Lease between plaintiffs and Humble contains an indemnity provision under the terms of which Yellow Cab agreed to indemnify and save harmless Humble —

> "of and from any and all liability or claims for loss, damage . . . to . . . property caused or occasioned by any leakage, fire or explosion of any of the products stored in said equipment or contained in or drawn through said equipment or by or in the . . . maintenance, repair . . . of said equipment or any of the attachments . . . whether due to latent or patent imperfections . . . or whether due to the negligence of Lessor or otherwise."

It is undenied that exculpatory agreements or contracts of indemnity are valid in Pennsylvania, provided they are properly executed, clearly express the intent of the parties, are between commercial entities, and do not otherwise contravene public policy or law. The lease was signed by the president of Yellow Cab, T. J. Harper, who

was intimately concerned with the everyday operations of plaintiffs. The lack of evidence of an authorizing directors' resolution or of a corporate seal is not sufficient, in these circumstances, to invalidate the lease on the grounds it was improperly executed.

So too is it clear that the intent of the agreement was for Yellow Cab to indemnify and save harmless Humble from liability such as that which might be imposed upon it in this lawsuit. There is no question but that Yellow Cab and Humble are commercial entities—both are corporations and both have been engaged in their respective businesses for several years. There has been no showing that any public policy has been contravened by this agreement or that it is contrary to law.

Therefore, the indemnity agreement between Yellow Cab and Humble is valid and enforceable, and would, had not Humble been found free from negligent liability with respect to the fire, operated to exonerate it regardless of any finding of negligence.

* * * * *

Counsel at oral argument and in their briefs have referred to a host of decisions on the law of negligence, especially relating to the concept of foreseeability and want of care. These citations have been examined. However, it is not believed that decisional citations are necessary in this opinion. The sum total of the evidence in this case not only exonerates Humble and Smith from any legal fault, but on the contrary clearly establishes that the cause of the fire was the careless refueling practices permitted by plaintiffs.

JURISDICTIONAL FINDINGS AND CONCLUSIONS

1. Both plaintiff corporations Speyer and Yellow Cab are organized and exist under the laws of Pennsylvania, and have their principal place of business in Erie, Pennsylvania.

2. Defendant Humble is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of New York.

3. A. O. Smith is a corporation organized and existing under the laws of the State of New York with its principal place of business in the State of Wisconsin.

4. As permitted by Rule 52, this Opinion includes the findings of fact and conclusions of law.

5. Although the case was tried on liability only against Humble and Speyer, the evidence establishes that the fire caused damages to each of the plaintiff corporations in excess of $10,000. This Court concludes it has jurisdiction of the parties under the diversity statute and of the subject matter of this civil action.

ORDER OF JUDGMENT

AND NOW, October 18, 1967, for the reasons mentioned in the foregoing opinion, the Clerk is DIRECTED to enter judgment against the plaintiffs Speyer and Yellow Cab, and in favor of the defendants Humble and A. O. Smith, and it is DIRECTED that all third party complaints are dismissed.

United States District Judge

GLOSSARY

1. SPEYER — Speyer, Inc. — Plaintiff
2. YELLOW CAB — Yellow Cab Company of Erie — Plaintiff
3. HUMBLE — Humble Oil and Refining Company — Defendant
4. A. O. SMITH — A. O. Smith Corporation — Defendant
5. ROCKWELL — Rockwell Manufacturing Company— Third Party Defendant
6. JABE — Jabe Construction and Equipment Company —Third Party Defendant
7. CEMICO — Cemico Oil Company
8. ERIE METER SYSTEMS — Erie Meter Systems, Inc., predecessor to A. O. Smith
9. #910 PUMP — Erie Model #910 Pump
10. ESSO — Esso Standard Oil Corporation, predecessor to Humble.
11. GOODYEAR — Goodyear Tire and Rubber Company

APPENDIX B

Opinion of the United States Court of Appeals for the Third Circuit

---

Argued September 17, 1968

Before MCLAUGHLIN, KALODNER and ALDISERT, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 12, 1968)

ALDISERT, *Circuit Judge:*

A gasoline fire destroyed plaintiff Speyer's garage and sixty-five taxicabs owned by plaintiff Yellow Cab Company of Erie, a tenant of Speyer. A diversity suit to recover the fire damage was instituted in the District Court against Humble Oil and Refining Company, a gasoline supplier, and A. O. Smith Corporation, successor-in-interest to the manufacturer of a certain gasoline pump. A twelve-day non-jury trial followed, and the court, after receiving 2,000 pages of transcribed testimony, rendered judgment in favor of both defendants.[1] Both plaintiffs have appealed from the trial judge's findings and conclusions.

In April, 1954 an Erie Meter Systems Model #910 gasoline pump was installed in the garage by Cemico, then the gasoline supplier of Yellow Cab. The pump was purchased from Erie Meter Systems by Cemico. In October, 1955 Yellow Cab changed its supplier from Cemico to Humble, and purchased Cemico's pump. As an accom-

---

[1] Speyer, Inc. v. Humble Oil & Refining Co., 275 F. Supp. 861 (W.D. Pa. 1967).

modation to its new customer, Humble purchased the pump from Yellow Cab and leased it back on a free basis. Yellow Cab employed no regular gasoline pump attendants; each driver filled his cab's tank at the completion of his shift.

As required by the equipment lease, Humble serviced and repaired the equipment from time to time, either through its own employees or through the services of independent contractors. In October, 1963 one of these contractors, Jabe, installed a new type, heavy-duty, flexsteel hose on the pump.[2] In April, 1964 two mishaps occurred. On April 20, the bumper of a cab hooked the flexsteel hose, and, as the driver drove his vehicle in the garage, the hose stretched extensively, and a quantity of gasoline leaked from the pumping equipment to the floor. Yellow Cab then shut down the pump. An investigation by the service contractor disclosed that a metal meter casting had fractured within the pump; the entire meter unit, including the metal cover casting was replaced, and the pump returned to service.

Nine days later, on April 29, a similar incident occurred. One of the drivers failed to remove the hose from his cab's tank before driving away from the pump. This caused the hose to jerk and stretch violently, bending the metal pipe coupling to which it was attached at the pump. Although most of the Yellow Cab employees witnessing this misadventure were aware of the leakage which had followed the accident nine days before, no one inspected the pump. Instead, another driver who had observed the violent jerking of the hose proceeded to place the pump in operation to fill his own tank. Shortly thereafter, gasoline was discovered on the floor near the pump. This time

---

[2] The reason for installing the new type hose was the inability of the regular hose to withstand the unusual wear-and-tear caused by the cab drivers' self-service filling station operation. There was evidence of five instances of damage to the pump hose by cab drivers prior to the switch to the new type.

the spilled gasoline erupted into flames, and the entire building and a large number of cabs were destroyed.

All parties agreed that the leakage of gasoline had been caused by the inability of the pump mechanism to relieve excess pressure which had been created within the system. The basic factual dispute was on the issue of what caused a dysfunction of certain pressure-relief valves.

The pre-trial statement of the plaintiffs and their evidence presented at trial disclose that they proceeded on various theories of liability. As to Humble: (1) defendant should be held to "the strict liability doctrine as applied to suppliers as well as manufacturers of equipment"[3]; (2) defendant breached the high degree of care to which it should be held because the equipment dispensed "a highly volatile and dangerous substance"[4]; (3) defendant failed to inspect and maintain the equipment properly, "and as a result thereof, the relief valve system malfunctioned" due to ". . . either a clogging with excessive grit or dirt, or to improper adjustment by Humble Oil Company or its agents"; (4) defendant provided a pump containing a casting which was "not adequate or proper".

As to A. O. Smith: (1) defendant improperly designed the meter head, furnishing a casting of "relatively poor

---

[3] Section 402A of the Restatement of Torts 2d, adopted as the law of Pennsylvania in Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966), provides: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

[4] See Hemrock v. Peoples Natural Gas Company, 423 Pa. 259, 223 A.2d 687 (1966); Prior v. Chambersburg Oil and Gas Company, 376 Pa. 521, 103 A.2d 425 (1954); Foley v. Pittsburgh-Des Moines Company, 363 Pa. 1, 68 A.2d 517 (1949).

grade material and the thickness of the casting was less than required under good engineering principles and practices"; (2) defendant failed to provide "fail safe" devices to furnish a warning relating to the buildup of pressures.[5]

The defendants contended that the proximate cause of the fire was the negligence of the Yellow Cab driver in failing to remove the nozzle from the tank prior to the cab's pulling away from the pump. They produced testimony that the pulling of the hose caused the steel components of the hose to contract, creating a buildup of pressure which led to the fracture of the casting.[6]

The court agreed with the defendants. It concluded that the fire was caused by the negligence of the plaintiff Yellow Cab, specifically indicating that the fire resulted from:

> ". . . The failure of the driver whose duty it was to remove the nozzle from the filler pipe before

---

[5] Citing Restatement of Torts 2d, Section 306, "Effect of Third Person's Duty to Inspect"; Section 394, "Chattel Known to be Dangerous"; Section 395, "Negligent Manufacture of Chattel Dangerous Unless Carefully Made"; and Section 401, "Chattel Likely to be Dangerous". For the duty imposed on the manufacturer, see Evans v. General Motors Corp., 359 F.2d 822 (7 Cir. 1966); Gossett v. Chrysler Corp., 359 F.2d 84 (6 Cir. 1966); Guffie v. Erie Strayer Co., 350 F.2d 378 (3 Cir. 1965).

[6] In his opinion, the trial judge states:

"Defendants' theory of the case rests upon a fact given little weight by the plaintiffs. Noting that preceding each instance of casting fracture, the hose had been subjected to a violent jerk, Humble formulated the theory that it was the jerk, and not the inoperative valves, which caused the casting fractures. Using a pump assembly and piping constructed to simulate the conditions which obtained at the Yellow Cab garage, defendants demonstrated to the Court that even in a properly maintained and cleaned pump assembly, with all valves thereby presumably operative, the meter head casting could be fractured simply by having a man stretch the hose to its full length and give it a sharp jerk. Defendants' experts explained this phenomenon by reference to the physical characteristics of the hose installed on the pump at the Yellow Cab garage and at the demonstrations. The hose, a Goodyear Flexsteel brand, is

> driving away from the pump, so to do. Nor is it a defense to argue as plaintiff does, that he could not have been aware of the exact nature of the danger involved; it is sufficient that he be, or should be, reasonably aware that the natural consequences of his act be dangerous."

The court said it had no difficulty in finding that the failure to remove the nozzle from the tank was negligence and that "such negligence was the proximate cause of the fire".

Rule 52 of the Federal Rules of Civil Procedure provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses". The Court defined the meaning of "clearly erroneous" in United States v. United States Gypsum Co., 333 U.S. 364, 395 (1949): "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

In reviewing the decision of the District Court, our responsibility is not to substitute findings we could have made had we been the fact-finding tribunal; our sole function is to review the record to determine whether the findings of the District Court were clearly erroneous, i.e.,

---

constructed of wire braid encased in rubber, which gives it greater strength and resistance to crushing, as when driven over by an automobile. As indicated, defendants' witnesses testified that this hose had been installed on the pump at the Yellow Cab garage because the abuse given other hoses had resulted in their being crushed and unsuitable for use. A peculiar characteristic of this hose, however, defendants' experts testified, was that because of the wire mesh construction, the bore of the hose, when stretched, tended to decrease at a rate greater than the length increased, resulting in a sharp reduction of volume and corresponding sharp increase in pressure, which, when transmitted back along the pipe to the meter head casting, caused the fracture." 275 F. Supp. at 866-867.

whether we are "left with a definite and firm conviction that a mistake has been committed". Eastern Express, Inc. v. Mack Warehouse Corp., 326 F. 2d 554 (3 Cir. 1964); International Industries, Inc. v. Warren Petroleum Corp., 248 F. 2d 696 (3 Cir. 1959), cert. denied, 355 U.S. 943 (1959); Williams v. The Babcock & Wilcox Co., 262 F. 2d 253 (3 Cir. 1959), cert. denied, 359 U.S. 969 (1959).

The basic evidence on liability was introduced by expert witnesses. The matter of weighing the credibility and persuasiveness of expert opinion is the unique function of the trier of fact. We stated in Brett v. J. M. Carras, Inc., 203 F. 2d 451 (3 Cir. 1953), that the findings of the trial judge will not be disturbed "where those findings are based on conflicting oral testimony and where, as here, the district court had full opportunity to observe the witnesses and to appraise their demeanor." 203 F. 2d at 453. More recently, in Hadco Products, Inc. v. Frank Dini Co., — F. 2d — (1968), we ruled that a choice between two permissible views by the fact finder is not "clearly erroneous" within the meaning of Rule 52.

The District Court accepted the testimony of the defense witnesses and rejected that of the plaintiffs. We cannot conclude that it was clearly erroneous to do so.

Plaintiffs now assert an alternative argument: that defendants were negligent in installing the flexsteel hose because it was foreseeable that certain uses of this hose would cause an extraordinary internal pressure which would fracture the meter casting. They argue that both defendants were chargeable with such knowledge, and hence were negligent in not rectifying the condition or issuing a warning about it. The argument is ingenious when viewed in the context of the history of this case. This theory was not advanced by plaintiffs in their pre-trial statements nor in their case-in-chief; moreover, the thrust of their own expert testimony was that the flexsteel hose could not have created the rupture in the casting. The examination of plaintiffs' expert Crankshaw (Appendix, page 657a) reveals:

"Q. Is it your testimony, then, that if the high pressure relief valve was clean, that the jerking of the hose on the morning of April 29, 1964, could not have ruptured the cover of the meter?

A. I think that is correct."

Apart from this patently inconsistent position of plaintiffs, the testimony indicated that the Underwriter's Laboratories, the recognized testing agency in the trade,[7] had placed its stamp of approval on the use of the flexsteel hose with gasoline pumps and that the hose was in general use in the trade.[8] It was only during the progress of this case that experts retained by defendants to conduct experiments for trial testimony discovered the peculiar characteristics of diameter-contraction, pressure-accumulation present in the hose.

The test is one of foreseeability. The trial judge concluded that Humble could not have reasonably foreseen such characteristics and consequences; to reverse that conclusion would be tantamount to a declaration that it was foreseeable as a matter of law. This we cannot do. To hold that the defendants should have known in 1964 the idiosyncrasies of the flexsteel hose which were not discovered by experts until 1967, is to ignore the realities of the case, namely, that the flexsteel hose was not a component of the pump as originally manufactured, that its use was initiated over nine years after the meter was sold and in-

---

[7] Underwriters is a non-profit service organization sponsored by the National Board of Fire Underwriters, In addition to establishing standards for construction and performance, it tests the product to determine whether it meets such standards. When a product passes such testing, it is "listed" in a publication which makes it available to the public.

[8] Evidence of common usage, custom or practice does not rule out negligence; it is nonetheless relevant to a determination of the standard of reasonable care and prudence to which the defendants are held. Forry v. Gulf Oil Corp., 428 Pa. 334, 237 A.2d 593 (1968); Donnelly v. Fred Whittaker Co., 364 Pa. 387, 72 A.2d 61 (1950.)

stalled, that the defendants were neither manufacturers nor dealers in hoses, that the flexsteel hose had received the approval of the Underwriter's Laboratories, and that it was in general use in the trade. The Supreme Court's observation in Brady v. Southern Ry. Co., 320 U.S. 476 (1943) is apropos: "Events too remote to require reasonable prevision need not be anticipated." 320 U.S. at 483.

There remains the question of the possible liability of both defendants under Section 402A of the Restatement of Torts 2d, adopted "as the law of Pennsylvania" in Webb v. Zern, 422 Pa. 424, 220 A. 2d 853 (1966).[9] As-

[9] Since the decision in *Webb*, the Pennsylvania Supreme Court has ruled on other aspects of Section 402A in Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966); Forry v. Gulf Oil Corp., *supra*, and Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 242 A.2d 231 (1968). In *Ferraro*, the Court held that if the buyer knows of the defect and voluntarily and unreasonably proceeds to use it, he is precluded from recovery. *Bialek* emphasized that liability imposed under Section 402A is for *selling* the product and not for causing the defect. Thus, sellers in the distributive chain are equally as liable as the manufacturer who produced the defective product. In *Forry*, an equally divided court held that where the plaintiff alleged damages caused jointly by the use of a defective product and the active negligence of a third party, that both elements of defective production and negligence must be established to impose liability on either.

Webb was decided on June 24, 1966, the same day as Miller v. Preitz, 422 Pa. 383; 221 A.2d 320. The concurring and dissenting opinions by Justice Jones and Justice Roberts set forth in elaborate detail the case law of Pennsylvania with respect to strict product liability where the action is contractual, based on breach of warranty resulting from a defect in the product. In interpreting the Uniform Commercial Code, Act of April 6, 1953, P.L. 3, Sec. 2-318, as amended by the Act of October 2, 1959, P.L. 1023, Sec. 2, 12 A.P.S. Sec. 2-318 (Supp., 1965), the right to recover in contract extends only to the immediate buyer of the product or those persons specifically described in the Code, and that, unless privity of contract (either factually or code-wise) be established, no right of recovery exists. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963). To this general rule there are certain exceptions, primarily

suming that A. O. Smith Corporation, as successor to Erie Meter Systems, could be considered the "seller" of the pump, it is clear that no liability can be imposed under Section 402A. An essential requirement for the imposition of such liability is that the product reach the ultimate user or consumer "without substantial change in the condition in which it was sold". The section specifically provides that a seller may not be held responsible for damages brought about by a modification of his product constituting a substantial change.

Nine years and seven months after the pump was sold, a new type hose, containing a steel wire braid component and capable of creating unusual pressure dynamics when violently stretched, replaced the type of hose ordinarily furnished with the pump. We hold that this was a substantial change in the condition of the product and that the doctrine of strict liability may not be applied to defendant A. O. Smith.

We now turn to defendant Humble, at whose direction the service contractor installed the flexsteel hose. Preliminarily, we must decide whether Humble can properly be classified as a "seller" or moreover, "a seller engaged in the business of selling such a product", within the provisions of Section 402A. If Humble is not such a seller, then no responsibility may attach under the doctrine of strict liability.[10]

---

in food products for human consumption. Caskie v. Coca Cola Bottling Co., 373 Pa. 614, 96 A.2d 901 (1953). Because *Miller* was decided the same day as *Webb*, it is probable that Pennsylvania will still apply the unique Pennsylvania rule limiting the class of plaintiffs it protects when the action is based on contractual liability. Since the instant action is brought in tort under 402A, we do not perceive a similar limitation as to the type of plaintiff, the tort strict liability being available "to the ultimate user or consumer, or to his property".

[10] A distinction must be drawn between the general liability of a "supplier" of chattels, as set forth in Chapter 14 of the Restatement of Torts, which is grounded in negligence, and the specific liability of a "seller", as contained in Section 402A, which is based

The trial court concluded: "The evidence showed that Humble was not in the business of selling pumps. It showed, on the contrary, that the pump in question was purchased by plaintiffs from Cemico and sold, still in place, to Humble who then leased it to plaintiffs. To find Humble liable under Section 402A because it furnished the pump assembly would thus be contrary to both the law and facts of the case."[11] 275 F. Supp. at 8 8. We agree.

In an effort to overcome these findings, plaintiffs urge the application of 402A because the pump was a "container" of Humble's product, gasoline.[12] This approach completely misconstrues the meaning of that term as it is used in the Restatement. A keg is certainly a container for beer[13]; a bottle is equally as much a container for beverages.[14] When the keg is considered with beer, and a bottle with beverages, the combinations are, in the view of the Restatement, "purchased by the user or consumer as an integrated whole . . . the container cannot logically be separated from the contents when the two are sold as a unit." The product and the actual container are considered as one unit when the test suggested by Professor Prosser is met: when the two are sold as an integrated whole, and it is inconceivable that anyone would buy one

---

on strict liability. Although Section 402A is located in Chapter 14, its comment "a" clearly states that its inclusion is "for convenience of reference and comparison with other sections dealing with negligence". For example, Sections 407 and 408, specifically deal with the liability of "lessors of chattels", and are based not on strict liability, but on general principles of negligence.

[11] Cf. Uniform Sales Act, Section 15, limiting the implied warranty of merchantability quality to one who deals in goods of that description; in Uniform Commercial Code Section 2-314, it is limited to a "merchant".

[12] Comment "h" to Section 402A reads in part: "No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole."

[13] Webb v. Zern, *supra*, note 3.

[14] Bialek v. Pittsburgh Brewing Co., *supra*, note 9.

without the other.[15] We resist the inescapable conclusion to plaintiffs' argument that gasoline is packaged and marketed in pumps.

The trial court found that Humble was not a seller within the meaning of Section 402A. We concur in that conclusion. Because this finding is dispositive of the appeal, no further consideration of this issue is necessary.[16] Similarly, it does not become necessary for us to pass upon the issues of unitary enterprise and the exculpatory clause in the indemnification agreement which were raised in this appeal.

The judgment of the District Court will be affirmed.

---

[15] Prosser, The Fall of the Citadel, 50 Minn. L.R. 791 (1966).

[16] Had plaintiffs successfully surmounted the hurdle of concluding Humble to be a "seller", they would then have been required to face the problem of whether the use of the hose by the cab driver driving the cab with the nozzle still inserted in the gas tank was "normal handling" of the product as contemplated by Section 402A. See Comment "h": "A product is not in a defective condition when it is safe for normal handling and consumption." See also Prosser, *supra*, note 15, where the author states:

"There appears to be no reason to doubt that strict liability has made no change in the rule, well settled in negligence cases, that the seller of the product is not to be held liable when the consumer makes an abnormal use of it. Sometimes this has been put on the ground that the manufacturer had only assumed responsibility only for normal use; sometimes it has gone off on 'proximate cause.' "

APPENDIX C

Statutory Provisions Involved

Constitution, Amendment XIV — Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U. S. C. 1652

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

Rule 16, R. C. P.

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

Rule 5. United States District Court Western District of Pennsylvania

II. Pre-Trial Procedure.

A. There will be a pretrial on every civil case, unless counsel for the parties stipulate in writing to the contrary and approval is given by the Judge. The Clerk shall set apart from time to time a list of cases to be known as the Pretrial Civil Jury List. Cases shall be added to this list as directed by the Court.

B. Non-jury cases shall be pretried in accordance with an Order by the Judge to whom the case has been assigned.

C. In all civil jury cases involving personal injuries, the following pretrial procedures are invoked and shall apply on written notice to counsel of record by the Clerk that a case has been placed upon the Pretrial Civil Jury List.

1. All discovery, including medical examinations, which is authorized by the Federal Rules of Civil Procedure shall be completed within 50 days after a case is placed on the Pretrial Civil Jury List. Additional medicals will be allowed but only upon Order of Court or written stipulation of the parties. Any other supplemental discovery or extension of time may only be granted after written motion and Order of Court.

2. Within 60 days after a case has been placed on the Pretrial Civil Jury List, counsel for the plaintiff shall serve a narrative written statement of the facts that will be offered by oral or documentary evidence at trial upon all counsel of record and file a copy with the Clerk of Court. There shall be attached to said written statement:

(a) A copy of all reports containing findings or conclusions of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and whom a party expects to call as a witness at the trial of the case. If timely production of any such report is not made, the testimony of such physician shall be excluded at the trial, except upon consent of the other party or parties.

(b) A copy of all reports containing findings or conclusions of any expert who has been consulted in connection with the matters involved in the case, and whom a party expects to call as a witness at the trial. If timely production of any such report is not made, the testimony of such expert shall be excluded at the trial, except upon consent of the other party or parties.

(c) The name and address of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and the name and address of any other expert who has been consulted in connection with the matters involved in the case, together with an authorization to all other parties to interview said physician or other expert, examine his pertinent records,

and obtain a report in connection with such injuries or other matters.

(d) Names and addresses of all witnesses the plaintiff expects to call. Said witnesses shall be classified as liability, medical or condition witnesses.

(e) Written authorization to inspect hospital records where plaintiff may have been examined, treated or hospitalized.

(f) The written statement shall include a list of the damages that plaintiff intends to claim and prove at the trial.

3. Within 70 days after a case has been placed on the Pretrial Civil Jury List, counsel for the defendant shall serve a narrative written statement of the facts that will be offered by oral or documentary evidence as a defense at trial upon all counsel of record and file a copy with the Clerk of Court. There shall be attached to said written statement:

(a) A copy of all reports containing findings or conclusions of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and whom a party expects to call as a witness at the trial of the case. If timely production of any such report is not made, the testimony of such physician shall be excluded at the trial, except upon consent of the other party or parties.

(b) A copy of all reports containing findings or conclusions of any expert who has been consulted in connection with the matters involved in the case, and whom a party expects to call as a witness at the trial. If timely production of any such report is not made, the testimony of such expert shall be excluded at the trial, except upon consent of the other party or parties.

(c) The name and address of any physician who has treated, examined, or has been consulted in con-

nection with the injuries complained of, and the name and address of any other expert who has been consulted in connection with the matters involved in the case, together with an authorization to all other parties to interview said physician or other expert, examine his pertinent records, and obtain a report in connection with such injuries or other matters.

(d) Names and addresses of all witnesses the defendant expects to call. Said witnesses shall be classified as liability, medical or condition witnesses.

4. Within 80 days after a case has been placed on the Pretrial Civil Jury List, counsel for the third party defendant shall serve a narrative written statement of the facts that will be offered by oral or documentary evidence at trial upon all counsel of record and file a copy with the Clerk of Court. There shall be attached to said written statement:

(a) A copy of all reports containing findings or conclusions of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and whom a party expects to call as a witness at the trial of the case. If timely production of any such report is not made, the testimony of such physician shall be excluded at the trial, except upon consent of the other parties.

(b) A copy of all reports containing findings or conclusions of any expert who has been consulted in connection with the matters involved in the case, and whom a party expects to call as a witness at the trial. If timely production of any such report is not made, the testimony of such expert shall be excluded at the trial, except upon consent of the other parties.

(c) The name and address of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and the name and

address of any other expert who has been consulted in connection with the matters involved in the case, together with an authorization to all other parties to interview said physician or other expert, examine his pertinent records, and obtain a report in connection with such injuries or other matters.

(d) Names and addresses of all witnesses the third-party defendant expects to call. Said witnesses shall be calssified as liability, medical or condition witnesses.

5. Within 90 days after a case is placed on a Pretrial Civil Jury List, counsel for the parties shall confer and consult at a place found mutually convenient to all concerned.

(a) Counsel for the parties shall consider the factual and legal issues involved and agree to supplemental medical examinations if necessary, and shall stipulate in writing as to all matters which are not in substantial dispute.

(b) Counsel shall make available to opposing counsel for inspection and copying all exhibits which he expects to offer in evidence. Counsel shall mark all exhibits which he expects to offer in evidence. At the pretrial conference, each counsel shall submit to the Court a written list of all exhibits which he expects to offer in evidence. This list shall contain the identifying mark of each exhibit, together with a brief description thereof. It shall be indicated on the written list (1) those exhibits which are to be admitted into evidence by stipulation, (2) as to any exhibit not so stipulated, the grounds for objection, briefly stated, (3) those exhibits to which there is an agreement of authenticity and waiver of formal proof, but general objections reserved, and (4) those exhibits which have been marked only for identification and formal proof of authenticity is demanded.

(c) Counsel shall explore the possibility of an amicable settlement and are requested to consult with their clients prior to the conference in order that they shall have authority to compromise the case if a settlement is possible.

(d) Trial counsel must attend the conference and the pretrial, *unless excused by the pretrial judge.*

6. One week prior to the actual date of pretrial counsel for the parties shall file with the Court a brief on any disputed question of law.

D. The procedure outlined in paragraph C, insofar as applicable, shall be followed in all civil jury cases, but a Judge may provide for a special pretrial procedure in any case assigned to him.

E. The Judge shall cause a record to be made of the facts and matters agreed upon at the pretrial conference. The record of the pretrial shall be deemed the pretrial order, except that the Judge may enter a separate Order. The Court may compel agreement as to undisputed facts. Counsel must object to or be deemed to have accepted the pretrial record and any order of the Judge entered therein.

F. The Court, at the pretrial conference, may consider motions to continue, to amend, to consolidate, or to sever.

G. Failure to fully disclose in the pretrial narrative statement or at the pretrial conference the substance of the evidence as to liability, defenses, and damages proposed to be offered at the trial, will result in the exclusion of that evidence at the trial. The only exceptions will be (1) matters which the Court determines were not discoverable at the time of the pretrial conference, (2) privileged matter, and (3) matter to be used solely for impeaching purposes.

H. When a case is listed for pretrial, it shall not be continued except for just cause. If there is a failure to comply with the pretrial rules, the Court may effect such penalties and sanctions as in the judgment of a Judge the circumstances warrant, which may include the dismissal of the plaintiff's cause of action, or the granting of permission to proceed ex parte, and barring any defendant who fails to comply from offering any testimony. If all parties fail to comply, the action may be dismissed.

I. At the pretrial conference, the Court may inquire as to the possibility of settlement. Any discussion pertaining to settlement shall not be a part of the pretrial order nor be permitted to be used in the trial of the case or any arguments or motions relating thereto.

J. After a case has been pretried, no amendment to any pretrial statement or other pleading shall be presented to the Clerk for filing unless authorized at the pretrial conference. Otherwise a party may amend only by leave of the Court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

SUPREME COURT, U. S.

FILED

APR 18 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 1202

SPEYER, INC. and YELLOW CAB COMPANY OF ERIE, Petitioners

v.

HUMBLE OIL & REFINING COMPANY and A. O. SMITH CORPORATION, Respondents

BRIEF AND APPENDIX OF RESPONDENT HUMBLE OIL & REFINING COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN M. WOLFORD
1111 G. Daniel Baldwin Bldg.
Erie, Pennsylvania 16501

CLOYD R. MELLOTT
BARTON Z. COWAN
1000 Porter Building
Pittsburgh, Pennsylvania
15219

DUNN, WOLFORD & SESLER
1111 G. Daniel Baldwin Bldg.
Erie, Pennsylvania 16501

ECKERT, SEAMANS & CHERIN
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Of Counsel

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

	PAGE
Opinions Below	1
Questions Presented	2
Counter-Statement of the Case	3
Argument	
I. The Decision of the Court of Appeals Affirming, on the Particular Facts, the Judgment of the District Court in a Non-Jury Trial Involving Application of the Law of Pennsylvania Relating to Negligence and Strict Liability, is Completely Valid and Proper and Does Not Merit Review by This Court.	10
II. Petitioners Should Not Be Permitted to Raise for the First Time on Petition for Certiorari an Objection to Trial Procedure Not Raised at Trial or in the Court of Appeals.	13
III. Pretrial and Trial Procedure Adopted by District Court Was Within That Court's Discretion, Which Discretion Was Properly Exercised.	15
Conclusion	19
Appendix	20

TABLE OF CITATIONS

CASES

Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198 (1956)	12
California v. Taylor, 353 U.S. 553 (1957)	13
Citron v. Aro Corporation, 377 F.2d 750 (3rd Cir. 1967), *cert. denied,* 389 U.S. 973 (1967)	18
Duignan v. United States, 274 U.S. 195 (1927)	13
Eisman v. Samuel Goldwyn, 30 F .Supp. 436 (S.D. N.Y. 1939)	15
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	10, 12

Table of Citations.

CASES	PAGE
General Box Co. v. United States, 351 U.S. 159 (1956)	12
Huddleston v. Dwyer, 322 U.S. 232 (1944)	12
Husty v. United States, 282 U.S. 694 (1931)	13, 14
Lawn v. United States, 355 U.S. 339 (1958), *rehearing denied,* 355 U.S. 967 (1958)	13
Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)	12

STATUTES AND RULES

28 U.S.C. § 1652	10
Rule 5 II B, U. S. District Ct., W.D. Pa.	15
Rule 5 II C, U. S. District Ct., W. D. Pa.	15

MISCELLANEOUS

1A Barron and Holtzoff, *Federal Practice and Procedure,* § 471 (1960 Ed.)	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 1202

SPEYER, INC. and YELLOW CAB COMPANY OF ERIE, Petitioners

v.

HUMBLE OIL & REFINING COMPANY and A. O. SMITH CORPORATION, Respondents

BRIEF AND APPENDIX OF RESPONDENT HUMBLE OIL & REFINING COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania (hereinafter called the "District Court") is reported at 275 F. Supp 861 (1967), and, contrary to the statement made in the Petition for Certiorari, the Opinion of the United States Court of Appeals for the Third Circuit (hereinafter called the "Court of Appeals") is reported at 403 F.2d 766 (1968).

QUESTIONS PRESENTED

1. Is certiorari warranted to determine whether a question of Pennsylvania law was properly decided in a non-jury trial where the District Court found the evidence established that an accident occurred solely as a result of plaintiffs' negligence and that the facts exonerated defendants from any legal fault whatever, which finding was sustained unanimously by the Court of Appeals, and where both the District Court and Court of Appeals fully considered, in rendering their respective decisions, the applicable law of Pennsylvania?

2. Should plaintiffs be permitted to raise for the first time on a petition for certiorari an objection to the trial procedure in a non-jury trial where such objection was not raised during trial, or before the District Court in either pretrial or post-trial arguments or briefs, and was not raised, briefed or argued before the Court of Appeals?

3. Is certiorari warranted to review the procedure utilized by the District Court, without objection from plaintiffs, in a non-jury, non-personal injury action where plaintiffs had full and ample opportunity to present their position and evidence?

COUNTER-STATEMENT OF THE CASE

It would require an unduly long counter-statement to correct all of the misstatements of fact and erroneous impressions of the facts which are created by plaintiffs' Petition. Fortunately we need not follow this approach since the material facts are clearly and accurately set forth in the opinions of the Courts below.[1]

---

1. Both the District Court and the Court of Appeals are in agreement as to the facts (District Court Opinion, P. 22; Court of Appeals Opinion, P. 42).

The fifth paragraph of the Jurisdictional Findings and Conclusions of the District Court, as quoted in plaintiffs' Petition, was amended by Order of the District Judge to correct a minor transcribing error. The Order Amending Finding reads in full as follows:

> "AND NOW, *October 19, 1967,* in my opinion and order entered October 18, 1967, in Jurisdictional Findings and Conclusions, 5th paragraph, the second line reads—'only against Humble and Speyer.' The word 'Speyer' is in error. The phrase should read—'only against Humble and Smith.' This correction is DIRECTED."

The last portion of footnote 9 in the Opinion of the Court of Appeals, as that footnote is quoted in plaintiffs' Petition, was amended by Order of the Court of Appeals. Following the citation to the Uniform Comercial Code in the third sentence, second paragraph of footnote 9, the footnote now reads as follows:

> ". . . it was held that the right to recover in contract extended only to the immediate buyer of the product or those persons specifically described in the Code, and that, unless privity of contract (either factually or codewise) be established, no right of recovery exists. See Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963). This distinction between the liability of remote manufacturers based on whether the suit was brought in contract or tort was recently abandoned in Kassab v. Central Soya, ... Pa. ....., 246 A.2d 848 (1968). Specifically overruling the *Miller* case, the court held that: '* * * Pennsylvania should join the fast growing list of jurisdictions that have eliminated the privity requirement in assumpsit suits by purchasers against remote manufacturers for breach of implied warrranty.' "

The Opinion as reported in 403 F.2d 766 (1968) contains the corrected version of the footnote.

The following is quoted from the Opinion of the Court of Appeals (403 F.2d 766 at pp. 767-768):[2]

"A gasoline fire destroyed plaintiff Speyer's garage and sixty-five taxicabs owned by plaintiff Yellow Cab Company of Erie, a tenant of Speyer [R. 288a-290a]. A diversity suit to recover the fire damage was instituted in the District Court against Humble Oil and Refining Company, a gasoline supplier, and A. O. Smith Corporation, successor-in-interest to the manufacturer of a certain gasoline pump.[3] A twelve-day non-jury trial followed, and the court, after receiving 2,000 pages of transcribed testimony, rendered judgment in favor of both defendants.[4] Both plaintiffs have appealed from the trial judge's findings and conclusions.[5]

---

2. All footnotes are by defendant Humble, except where indicated. All record references in brackets are by defendant Humble. References to the Petition for Certiorari or to its Appendices are by page number following a "P.". References to this Brief and its Appendix are by page number following the abbreviation "Br.". References to the Appendices filed in the Court of Appeals are by page number following an "R.". Page numbers using the letter "a" are from Appendix of Appellants filed in the Court of Appeals (Petitioners here); and page numbers using the letter "b" are from Appendix of Appellees filed in the Court of Appeals (Respondents here).

3. In part, plaintiffs filed this suit on behalf of certain insurance companies. See H. Exs. 141-143. 155-158 (R. 733b-737b, 741b-747b).

4. [Footnote by the Court.] Speyer, Inc. v. Humble Oil & Refining Co., 275 F. Supp. 861 (W. D. Pa. 1967).

5. The trial judge found, *inter alia*, that the defendants were not negligent in any respect; that the defendants were not liable to the plaintiffs under any theory of strict liability; that the sole cause of the fire was the negligence of both of the plaintiffs; that plaintiffs were a single business enterprise; and that an exculpatory clause in a lease between plaintiffs and defendant Humble was enforceable under Pennsylvania

"In April, 1954 an Erie Meter Systems Model #910 gasoline pump was installed in the garage by Cemico, then the gasoline supplier of Yellow Cab [R. 306a-307a, 409a, 422a]. The pump was purchased from Erie Meter Systems by Cemico.[6] In October, 1955 Yellow Cab changed its supplier from Cemico to Humble [R. 267a-269a; H. Ex 122], and purchased Cemico's pump [R. 312a, 412a-413a; 701b; Pl. Ex. 25]. As an accommodation to its new customer, Humble purchased the pump from Yellow Cab and leased it back on a free basis [R. 310a-312a, 1154a-1156a; H.Ex. 115]. Yellow Cab employed no regular gasoline pump attendants; each driver filled his cab's tank at the completion of his shift [R. 116a, 140a-142a, 173a, 189a, 200a, 207a, 211a, 28b, 560b-561b, 563b, 682b-683b].[7]

"As required by the equipment lease, Humble serviced and repaired the equipment from time to time, either through its own employees or through the services of independent contractors[8] [R. 343a-345a, 847a-859a].

---

law and would exonerate Humble from liability in any event (P. 22-41).

6. As stated in the Opinion of the District Court (P. 23):

"The Erie pump was selected by J. T. Harper, the President of Yellow Cab, and Humble had nothing whatever to do with its selection, purchase or installation." (R. 207a, 312a, 406a, 422a.)

7. Plaintiffs' statement in their Petition (P. 4) that "gasoline was dispensed by defendant Humble to the taxicabs" is completely false.

8. Plaintiffs' unqualified statement on page 4 of their Petition that Humble assumed a duty to maintain and repair the dispensing unit is untrue. Further, the implications in plaintiffs' Petition (P. 2) that Humble had a duty to maintain the nozzles is completely false. All evidence in the record supports the trial Court's finding (R. 1204a) that "the fur-

In October, 1963 one of these contractors, Jabe,[9] installed a new type, heavy-duty, flexsteel hose[10] on the pump[11] [R. 853a-854a, 713b-719b; H.Ex. 83]. In April, 1964 two mishaps occurred.[12] On April 20, the bumper of a cab hooked the flexsteel hose, and, as the driver drove his vehicle in the garage, the hose stretched extensively, and a quantity of gasoline leaked from the pumping equipment to the floor [R. 273a-277a, 558b]. Yellow Cab then shut down the pump. An investigation by the service contractor disclosed that a metal meter casting had fractured within the pump; the entire meter unit, including the metal cover casting was

---

nishing and maintenance of nozzles was the responsibility of Yellow Cab." There was no controversy on this fact, which was admitted by plaintiffs at the trial (R. 317a-319a, 342a, 368a-370a, 1109a-1110a; 703b, 705b; Pl. Exs. 66, 67).

9. In their Petition (P. 4, 5) plaintiffs characterize Jabe as Humble's "agent", despite the finding by the District Court, supported by substantial evidence, that Jabe was an independent contractor (P. 23). The District Court found that Jabe was the best pump service contractor in the Erie area (P. 23; R. 522b-523b).

10. This hose, manufactured by Goodyear (R. 853a-854a; 713b-719b; H. Ex. 83), had Underwriters' Laboratories approval (R. 1068a; 433b-434b) and was used only at problem locations where a heavy duty hose was needed or when requested by a customer (R. 865a-866a, 910a).

11. [Footnote by the Court.] The reason for installing the new type hose was the inability of the regular hose to withstand the unusual wear-and-tear caused by the cab drivers' self-service filling station operation. There was evidence of five instances of damage to the pump hose by cab drivers prior to the switch to the new type [R. 851a-853a].

12. Plaintiffs' statement in their Petition (P. 4) that "At no time prior to April 20, 1964 had any incident occurred with respect to the pump" is misleading since frequent incidents of such damage had occurred. (R. 1177a; See fn. 11, *supra*.) As stated by the District Court (P. 24), "Hose trouble frequently occurred. . . ."

replaced, and the pump returned to service [R. 455a-458a, 462a-469a, 889a, 74b, 317b-319b, 617b-619b].[13]

"Nine days later, on April 29, a similar incident occurred. One of the drivers failed to remove the hose from his cab's tank before driving away from the pump.[14] This caused the hose to jerk and stretch violently [R. 209a-210a, 219a, 222a-223a, 226a, 229a, 553a-554a], bending the metal pipe coupling to which it was attached at the pump [P. 26; R. 715a-716a, 765a, 780a-781a, 348b-349b; Pl.Ex. 13]. Although most of the Yellow Cab employees witnessing this misadventure were aware of the leakage which had followed the accident nine days before, no one inspected the pump [R. 211a-212a, 241a]. Instead, another driver who had observed the violent jerking of the hose proceeded to place the pump in operation to fill his own tank [R. 211a-212a]. Shortly thereafter, gasoline was discovered on the floor near the pump [R. 211a-212a]. This time the spilled gasoline erupted into flames, and the entire building and a large number of cabs were destroyed [R. 213a-215a]."

Trial in the District Court took place in April and May, 1967 before the Honorable Joseph P. Willson, D.J.,

---

13. Plaintiffs' statements and inferences in their Petition (P. 5, 10) that no investigation was made after the April 20 incident are contrary to the findings of the District Court (P. 25) and the evidence, and are untrue. As stated by the trial judge in his Opinion, Jabe made "the necessary repairs" and "the usual inspection and operating tests." (P. 25.)

14. As stated by the cab driver and found by the District Court, the driver "hooked" the nozzle of the hose in the filler pipe of the cab. This rendered ineffective certain safety features which might otherwise have prevented the accident. (P. 25-26; R. 174a, 183a, 560b-562b, 680b-681b, 707b; H. Ex. 1.)

without a jury. Extensive pretrial discovery procedures had ensued between the date the action originally was filed in December, 1964 and the time of trial. Following a pretrial conference held on December 29, 1966, an order was entered by Judge Willson, directing plaintiffs to file a pretrial narrative on or before January 20, 1967, "stating precisely the basis of liability of each of the two defendants. . . ."[15] (Br. 21). Further, Judge Willson, having given consideration at the hearing to a motion of defendant Humble to continue the trial until May 29, 1967, included a provision in this same Order that trial would commence April 3, 1967 inasmuch as the trial would be non-jury and plaintiffs' counsel had stated they were prepared to proceed[16] (Br. 21). Plaintiffs entered no objection or protest to this Order of December 29, 1966. However, plaintiffs did not file their pretrial statement until February 6, 1967. Trial commenced April 3 and continued through April 7. On April 6, the trial judge indicated that the Court would recess the trial on April 7 and resume May 10. No objection was made (Br. 22). Prior to the recess on April 7, defendant Humble was directed by the Court, without objection from plaintiffs, to file its pretrial statement by May 1 (Br. 22-23). No previous direction in this regard had ever been entered by the Court or requested by the plaintiffs. Further, at the request of and with the agreement of plaintiffs, and after consultation between Judge Willson and all counsel, defendant

---

15. The basis for liability of defendants asserted by plaintiffs was not made known by plaintiffs until the filing of their pretrial statement on February 6, 1967, more than two years after their complaint was filed.

16. At the pretrial hearing held December 29, 1966, counsel for the plaintiffs stated (Br. 20): "I can assure Your Honor before we started the suit, we had the proof."

Humble subsequently agreed to file its pretrial statement on or before April 26 (Br. 23-24). Defendant Humble filed and served its pretrial statement on April 26, 1967, including at the same time as an attachment thereto all reports of Humble's experts on tests and results concluded through April 26.[17] Plaintiffs were not surprised by the theory of the defense, as set forth in the pretrial statement of defendant Humble, since that theory had first been asserted by Humble and made known to plaintiffs in the Answer filed by Humble in February, 1966, more than fourteen months prior to the commencement of the trial and more than one year prior to the filing of plaintiffs' pretrial statement. On May 5, 1967, five days prior to the resumption of trial, a demonstration was conducted by defendant Humble and its experts for the benefit of and in front of plaintiffs' counsel and plaintiffs' experts. This demonstration reenacted the critical tests which defendant Humble subsequently relied on in the presentation of its case on defense.

At the close of the case presented by both defendants, plaintiffs were given the opportunity to put into evidence any rebuttal testimony, and plaintiffs did introduce such rebuttal testimony, including additional testimony from their principal expert witness (R. 1134a-1145a).

---

17. Plaintiffs' statement in their Petition (P. 6) that they did not receive the reports of defendant Humble's experts until the morning of resumption of trial on May 11, 1967, is untrue. Plaintiffs received, on April 26, 1967, dedendant Humble's pretrial statement, together with all Humble expert reports then in existence. The only expert report of defendant Humble which plaintiffs did not receive at that time was a report of a test conducted on April 28, 1967 by one of defendant Humble's experts. This report was furnished to plaintiffs on May 5, 1967, the date on which it was rendered to Humble.

ARGUMENT

I. The Decision of the Court of Appeals Affirming, on the Particular Facts, the Judgment of the District Court in a Non-Jury Trial Involving Application of the Law of Pennsylvania Relating to Negligence and Strict Liability, Is Completely Valid and Proper and Does Not Merit Review by This Court.

Petitioners' first two arguments are that the Court of Appeals and the District Court "failed to apply" Pennsylvania law to the facts involved and hence violated the requirements of 28 U.S.C. § 1652 and *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). There is no merit whatever to this contention.

A perusal of the opinions of the Court of Appeals and the District Court in this case abundantly demonstrates that the law of Pennsylvania was fully considered and applied by both Courts to the facts found by the trial judge in this non-jury trial. The issues in this case solely involved questions of Pennsylvania law, and no federal questions whatever were involved. After the conclusion of the trial in the District Court case, lengthy briefs were submitted by all parties to the learned trial judge. The briefs of both plaintiffs and defendants argued Pennsylvania Law, and only Pennsylvania law, as the applicable law to the facts urged by each party upon the Court. The Pennsylvania law cited by plaintiffs in their Petition for Certiorari was fully briefed by both plaintiffs and defendants in their presentations to the trial Court. In addition to written briefs, a lengthy oral argument was held before Judge Willson, during which time many of the facts and legal

points were reviewed. As stated by the learned trial judge in his Opinion (P. 39):

> "Counsel at oral argument and in their briefs have referred to a host of decisions on the law of negligence, especially relating to the concept of foreseeability and want of care. These citations have been examined. . . .The sum total of the evidence in this case not only exonerates Humble and Smith from any legal fault, but on the contrary clearly establishes that the cause of the fire was the careless refueling practices permitted by plaintiffs."

On the appeal to the Court of Appeals, the law of Pennsylvania again was the only law considered by the Court. At the appellate level also, each Pennsylvania case cited by plaintiffs in their Petition was fully briefed by the parties and exposed to the Court of Appeals in oral argument.[18] Thus, both the District Court and the Court of Appeals considered this case on the basis of the law of Pennsylvania and made their respective determinations based on the application of that law, as they determined it to be, to the facts involved. The trial judge and two of the three members of the Court of Appeals panel which heard the case on appeal were and are members of the Bar of Pennsylvania. Judge Aldisert, who wrote the Opinion for the Court of Appeals, had been appointed to that Court less than two months prior to the oral argument, after having served for many years as a trial judge of the Court of Common Pleas of Allegheny County, Pennsylvania.

---

18. Of the eight Pennsylvania cases cited by plaintiffs in their Petition as not having been applied by the Courts below, four were actually mentioned in the decision of the Court of Appeals (P. 44, 49).

Clearly, the contention by plaintiffs on this Petition that the lower Courts failed or refused to apply Pennsylvania law is contrary to what actually occurred, and that contention should be rejected. As a reading of the opinions of the District Court and the Court of Appeals demonstrates very conclusively, those Courts not only considered in detail the applicable Pennsylvania law, they accurately interpreted and applied that law to the facts in this case.

In essence, plaintiffs' contention is that the determination of Pennsylvania law by the District Court and by the Court of Appeals with respect to negligence, the duty to warn, and the doctrine of strict liability was erroneous, and that because of such error, the lower Courts failed to observe the dictates of *Erie Railroad Co. v. Tompkins, supra.* If plaintiffs' position were accepted, every diversity case in the federal courts would involve an *Erie* question where, as here, a petitioner challenged the interpretation of state law as determined by the lower court. We submit that such a result is unsound and not dictated by *Erie.* The issues of Pennsylvania law involved in this case are not of such import as to warrant review by this Court. Where, as here, there has been thorough consideration and a determination by the District Court and by the Court of Appeals of a matter of local law, we respectfully submit that this Court should follow its customary and sound rule in such a situation and accept such determinations on the questions of local law. *General Box Co. v. United States,* 351 U.S. 159, 165 (1956); *Bernhardt v. Polygraphic Company of America, Inc.,* 350 U.S. 198 (1956); *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 534 (1949); *Huddleston v. Dwyer,* 322 U.S. 232 (1944). Accordingly, the writ of certiorari should be denied.

II. Petitioners Should Not Be Permitted to Raise for the First Time on Petition for Certiorari an Objection to Trial Procedure Not Raised at Trial or in the Court of Appeals.

Petitioners' final argument in support of its Petition is that the trial procedure utilized by the District Court in this non-jury trial, wherein defendants were permitted to file pretrial statements after the presentation of plaintiffs' evidence and wherein a recess of four weeks occurred between the presentation of plaintiffs' case and the presentation of the defense by defendants, represented a misapplication of the pretrial procedures of the Federal Rules of Civil Procedure. This contention, which is wholly without merit, was not raised by plaintiffs before the Court of Appeals, and no objection to the procedure adopted by the trial Court was made by plaintiffs at any time during these proceedings at the trial stage. Accordingly, we respectfully submit that plaintiffs should not now be allowed for the first time to raise this matter for review.

This Court has frequently stated that it will not consider questions which were not raised in the appellate court below. *Lawn v. United States,* 355 U.S. 339 (1958), *rehearing denied,* 355 U.S. 967 (1958); *California v. Taylor,* 353 U.S. 553 (1957); *Husty v. United States,* 282 U.S. 694 (1931); *Duignan v. United States,* 274 U.S. 195 (1927). As stated in *Lawn v. United States,* where the Court refused to consider a contention of petitioners that the trial court had erred in ruling on a motion at trial, this Court said (at p. 362):

> "This issue was not raised in the Court of Appeals. Only in exceptional cases will this Court review a question not raised in the Court below."

Similarly, in *Husty v. United States, supra,* the Court said (at pp. 701-702):

> "Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the appeal to the Court of Appeals, and it does not appear that they were presented or passed upon there."

In the case at bar, plaintiffs' claim of error in the trial and pretrial procedure was not raised or argued by them in the Court of Appeals. Further, at the trial and pretrial stages of this case, plaintiffs not only did not object to the procedures of which they now complain, but they acquiesced in and agreed to the procedures used. See Br. 20-24. Accordingly, we submit that the argument of petitioners with respect to pretrial and trial procedures raised here by plaintiffs for the first time should not now be considered.

III. Pretrial and Trial Procedure Adopted by District Court Was Within That Court's Discretion, Which Discretion Was Properly Exercised.

Even if petitioners had raised and argued before the lower Courts the objection which they now make with respect to the pretrial and trial procedure used, such argument would not have had any merit. It is well settled that the formulation of pretrial procedure, especially in a non-jury trial, is within the discretion of the trial court. See, for example, *Eisman v. Samuel Goldwyn,* 30 F. Supp. 436 (S.D.N.Y. 1939). As stated in 1A Barron and Holtzoff, *Federal Practice and Procedure,* §471 (1960 Ed.) at p. 830:

> "[Rule 16 of the Federal Rules of Civil Procedure] places complete discretionary control of pre-trial procedure with the court . . . ."

Pursuant to Rule 16 of the Federal Rules of Civil Procedure, the District Court for the Western District of Pennsylvania has formulated Pretrial Procedure Rules, including the following as Rule 5 II B:

> "B. Non-Jury cases shall be pretried in accordance with an Order by the Judge to whom the case has been assigned."[19]

---

19. Plaintiffs in their Petition completely misrepresent the application of Rule 5 II C of the Rules of the United States District Court for the Western District of Pennsylvania. Subsection II C of Rule 5, which sets forth the specific pretrial procedure urged here by plaintiffs as being applicable to this case, applies only to "jury cases involving personal injuries." (P. 54.) It is not applicable to jury trials not involving personal injuries or to any non-jury trial. Rule 5 II B is the appropriate rule governing the pretrial procedure in cases other than civil jury cases involving personal injuries and, consequently, is the pertinent rule applicable to this non-jury, non-personal injury case.

In the case at bar, Judge Willson, who heard and decided numerous pretrial motions and arguments, entered appropriate orders, after discussion with counsel, setting forth both the dates on which pretrial statements were to be submitted and the trial schedule. Since plaintiffs not only did not object to these orders, but indicated their willingness to proceed on the basis of these orders, they should not now be permitted to complain.

As noted in the opinions of both the District Court and the Court of Appeals, plaintiffs tried their case on several theories of liability, all of which excluded the theory that the proximate cause of the fire was the careless and negligent refueling practices permitted by plaintiffs (P. 27-28, 45-47). Defendants' theory, on the other hand, was that the negligence of the cab driver in failing to remove the nozzle from the tank of the cab prior to driving away from the pump, and the negligence of plaintiffs in several other related respects, caused the accident (P. 27-31, 45-47). The basic evidence of liability was introduced by expert witnesses (P. 47), and the defendants' theory as supported by defendants' experts was completely rejected by plaintiffs' experts (P. 47-48). However, the District Court accepted the testimony of the defense witnesses and rejected that of the plaintiffs (P. 47), and the Court of Appeals stated that it could not conclude that this determination was erroneous. (P. 47).

Plaintiffs' argument about the trial procedure in essence is an argument that had they known of defendants' theory prior to trial, they would have abandoned their theory and adopted that of defendants. There are certain basic fallacies with this argument. In the first instance, plaintiffs should have been fully aware of

defendants' theory at a very early stage in the case, since the Answer filed by defendant Humble more than fourteen months prior to trial (R. 5a) set forth the theory on which defendants relied throughout this case (R. 45a).[20] Second, plaintiffs, following the trial, argued their case on the basis of both causation theories; i.e., that of plaintiffs and that of defendants. Similar arguments were made by plaintiffs to the Court of Appeals. These arguments were thoroughly considered and then rejected by the Court of Appeals (P. 30-31, 47-48). Accordingly, no prejudice whatever resulted to plaintiffs since they were permitted, and did argue, their positions based on both causation theories after they had at least two months following the trial to research the applicable law. Plaintiffs did not file their brief with the District Court until two and one-half months after the conclusion of the trial (R. 14a), and their brief with the Court of Appeals was not filed until several months after the trial judge's Opinion which was entered on October 19, 1967.

Finally, plaintiffs argue that the delay in hearing the defendants' evidence was prejudicial to plaintiffs since "Judges' memories are no more infallible than

---

20. Defendant Humble, in paragraph 3 of the Third Defense of the Answer which it filed, averred as follows (R. 45a):

> "3.) That the fire in question and the alleged malfunction of said pump, if it malfunctioned, occurred by reason of plaintiffs through their employees failing to control the use and operation of the pumps by their employees and specifically further by an employee and driver of Yellow Cab Company driving away from the pump in question with the hose to the automatic nozzle being in the intake pipe of one of plaintiff vehicles or cabs."

jurors' memories." (P. 20.) This argument overlooks a very obvious and significant fact difference. In a jury trial, jurors do not usually have the benefit of a transcript of testimony which they may take into the jury room with them during their deliberations. However, in a non-jury trial, as in this case, the trial judge has before him the complete transcript of all the testimony taken at the trial, and all counsel are permitted to and do argue the facts and law by specific reference to the testimony in the transcript which they contend supports their position.

This difference is extremely significant and clearly demonstrates that a recess in a non-jury trial is not prejudicial. This practice of having recesses during the trial is followed frequently by the courts in non-jury proceedings. The case of *Citron v. Aro Corporation,* 377 F.2d 750 (3rd Cir. 1967), *cert. denied,* 389 U.S. 973 (1967), cited by plaintiffs in their Petition, is completely distinguishable from the case at bar, since that case involved a jury trial with periodic delays between presentation of testimony. In *Citron,* the Court referred to the uncertainty of the memory of jurors who are required to decide a case long after the presentation of plaintiff's evidence. Such is not the situation in the present case, where the transcript of testimony and briefs of the parties were available to the trial judge sitting as a finder of fact. One might also observe that if plaintiffs' position were adopted, a trial judge, in a non-jury case, would be required to render his decision immediately at the close of the trial rather than, as is the normal and accepted practice, several months later following the submission of briefs by all parties.

Thus, even if plaintiffs' assertion of an alleged objection to the pretrial and trial procedure was timely before this Court, such assertion would be completely without merit and would not warrant review by this Court. Accordingly, this Court should not issue the writ requested by plaintiffs.

CONCLUSION

We respectfully submit that there is nothing in the instant case that justifies the granting of a writ of certiorari. The case depends on the application of Pennsylvania law, in a non-jury trial, to a particular set of facts. The District Court and the Court of Appeals thoroughly considered the applicable Pennsylvania law and then rejected plaintiffs' contentions with regard thereto. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN M. WOLFORD
CLOYD R. MELLOTT
BARTON Z. COWAN
Counsel for Respondent
Humble Oil & Refining
Company

DUNN, WOLFORD & SESLER
ECKERT, SEAMANS & CHERIN
Of Counsel

APPENDIX

Excerpt From Transcript of Pretrial Argument Held December 29, 1966 Before the Honorable Joseph P. Willson, D. J.

[20]

* * * * * * *

The Court: . . . Just one more thing before we get into the motions. Do plaintiffs agree you've got to show me the cause of this fire?

[21]

Mr. Gent: Yes.

Mr. Knox: Yes, Your Honor. We didn't know we were under any orders right now to file narrative statements.

The Court: No, no, I'm just rounding this off. You've got to show that.

Mr. Knox: That's right, we have opinions of experts on it, which we will attach to the narrative statement. So when we get to that point, we will get to that.

Mr. Gent: I can assure Your Honor before we started the suit, we had the proof.

* * * * * * *

Excerpt From Orders Entered December 29, 1969 on Motions for Production, Discovery and Fixing Time of Trial.

* * * * * * *

AND NOW, December 29, 1966, a hearing has been had on the several pending motions and on various other issues relating to the production and exchange of documents and discovery generally. Several oral rulings were made throughout the course of the hearing, particularly with reference to production and exchange of documents which counsel will abide by and which will appear on the transcript of the hearing. However, it is appropriate on several of the rulings made that written orders be entered which follow:

* * * * * * * *

6. Plaintiffs' counsel on or before January 20, 1967 will file a pretrial narrative in accordance with the rules of this Court in non-jury cases stating precisely the basis of the liability of each of the two defendants and the damages claimed.

7. Consideration has been given to the motion of defendant Humble to continue the trial of this case to May 29, 1967. However, as indicated, the trial will be non-jury. Plaintiffs' counsel having indicated that they will be ready, it is ORDERED AND DIRECTED that the trial of this case commence on Monday, April 3, 1967, at 10:30 a.m., and that these Orders as well as the oral rulings as will appear in the transcript apply to both civil actions as appropriate, the understanding being

however that the trial of Civil Action No. 51-65 be postponed until after the trial of Civil Action No. 1177.

JOSEPH P. WILLSON
United States District Judge

cc: All counsel

Excerpt From Transcript of Trial — April 6, 1967.

[754]

* * * * * * * *

The Court: . . . I mean, I propose this. I just want to throw this out tonight, so you can think about it, and we can agree on a time tomorrow to resume again. But, I had in mind to start on the 10th day of May with the rest of your case, and then with the defense. Is that all right?

Mr. Mellott: Yes, sir, I think that would be all right with the defendant Humble, Your Honor.

Mr. Gent: We understood, Your Honor, that we were to present the liability first.

The Court: I mean to start with your damages on the 10th.

Mr. Gent: Oh, all right.

[755]

* * * * * * * *

Mr. Knox: I think also, Your Honor, if they [756] are going to start with their liability, we should be furnished with some pretrial statement. We had to give them ours.

The Court: I think so. I think they ought to file that.

Mr. Mellott: All right. Could we have until the end of this month for that, Your Honor?

The Court: Would ten days be enough for the plaintiffs?

Mr. Knox: Sure.

* * * * * * * *

Letter Dated April 18, 1967 of the Honorable Joseph P. Willson, D. J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Pittsburgh 15219

CHAMBERS OF
JOSEPH P. WILLSON
JUDGE

April 18, 1967

JOHN G. GENT, ESQ.
1115 G. Daniel Baldwin Building
Erie, Pennsylvania 16501

WILLIAM KNOX, ESQ.
23 West Tenth Street
Erie, Pennsylvania 16501

RAYMOND G. HASLEY, ESQ.
9th Floor, Oliver Building
Pittsburgh, Pennsylvania 15222

CLOYD MELLOTT, ESQ.
10th Floor, Porter Building
Pittsburgh, Pennsylvania 15219

JOHN M. WOLFORD, ESQ.
1111 G. Daniel Baldwin Building
Erie, Pennsylvania 16501

Re: Speyer, Inc. & Yellow Cab Co. of Erie
v. Humble Oil & Refining Company and
A. O. Smith Corporation, et al.
C. A. No. 1177 Erie

Gentlemen:

Mr. Gent by letter of April 14th indicated he was filing a motion relative to the time for filing of the defendant Humble's pretrial statement. By telephone conversation it has been agreed that this will be filed on or before the 26th. Mr. Mellott indicates also that he will comply with the request in the letter relating to the physical test of the equipment. With this understanding of counsel, it will be unnecessary to enter any formal order on the motion. All parties, of course, understand that the trial will resume on Wednesday, May 10th, at 10:00 o'clock A.M.

Regards,

JOSEPH P. WILLSON
Joseph P. Willson

LIBRARY
REME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 18 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 1202

SPEYER INC. and YELLOW CAB COMPANY OF ERIE,
Petitioners,

v.

HUMBLE OIL & REFINING COMPANY and
A. O. SMITH CORPORATION,
Respondents.

BRIEF OF A. O. SMITH CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RAYMOND G. HASLEY,
ROGER CURRAN,
ROSE, SCHMIDT AND DIXON,
Attorneys for Respondent,
A. O. Smith Corp.

9th Floor, Oliver Building,
Pittsburgh, Pennsylvania 15222.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
5022 CARLYN DRIVE, PITTSBURGH, PA., 15236,
412-881-7463.

INDEX.

	PAGE
Counter-Statement of the Case	1
Reasons in Opposition to the Issuance of a Writ of Certiorari	5
The pretrial procedure in this case followed the usual and accepted course in non-jury proceedings, was fully agreed to by Petitioners, and was not prejudicial in any way	5
Conclusion	9

TABLE OF CITATIONS.

Case.

Carl D. Citron v. Aro Corporation, 377 F. 2d 750 (3rd Cir. 1967)	8

RULES.

Fed. R. Civ. P. 16	5
W. D. Pa. R. 5 II (b)	6

IN THE

Supreme Court of the United States

October Term, 1968

No. 1202

SPEYER INC. and YELLOW CAB COMPANY OF ERIE,
Petitioners,

v.

HUMBLE OIL & REFINING COMPANY and
A. O. SMITH CORPORATION,
Respondents.

BRIEF OF A. O. SMITH CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counter-Statement of the Case.

Respondent A. O. Smith Corporation incorporates herein and adopts the statement of the case set out in the comprehensive opinion in the United States District Court for the Western District of Pennsylvania in this case reported at 275 F. Supp. 861 (W. D. Pa. 1967) (A. 22-41), and the statement of the case in the opinion of the United States Court of Appeals for the Third Circuit reported at 403 F. 2d 766 (3rd Cir. 1968) (A. 42-52). Hence, Respondent A. O. Smith will make no Statement of the Case beyond

what is necessary to correct certain gross inaccuracies in the Statement of the Case in the Petition for a Writ of Certiorari.

The gasoline dispensing unit or pump involved in this case was alleged to have been manufactured and sold by Erie Meter Systems, Inc., a dissolved corporation (R. 30a, 35a), the assets of which were purchased by Respondent A. O. Smith in 1958.* With reference to this dispensing unit, it is stated at page 6 of the Petition:

> "The pump had no safety valve to relieve pressure coming from the hose end of the pump. The relief valves in the pump itself were not capable of relieving the pressures exerted in the system with the use of the Goodyear Flexsteel hose, although the hose was admittedly an integral part of the dispensing unit without which it could not function. . . . It was concluded by experts for all the parties that the casting was ruptured by the internal pressure, and that the valves on the pump could not, and did not, relieve the pressure."

Petitioners' own proof in the case categorically contradicts this allegation. Mr. Crankshaw, Petitioners' chief expert in the District Court, testified at the trial that in his opinion absent faulty maintenance (which cannot be charged to A. O. Smith since it was not responsible for maintaining the dispensing unit), the pressure relief system in this unit was sufficient to prevent any foreseeable failure from internal pressure (R. 532a-533a). The District Court, sitting without a jury, after hearing the entire testimony, agreed and concluded:

> "It is apparent that Erie was extremely conservative in the design and construction of its pumping unit,

* It should be pointed out that at the trial of this case A. O. Smith Corporation strongly resisted the allegation that it was responsible for any alleged negligence of Erie Meter Systems, Inc. This matter was not decided by the trial court in view of its decision on the merits (A. 34).

and hence cannot be found liable in this regard." (A. 35)

The Court of Appeals refused to set aside the findings of fact made by the trial judge, and quite correctly pointed out that Petitioners took the position that the pressure relief system was perfectly adequate:

> "Plaintiffs now assert an alternative argument: that defendants were negligent in installing the flexsteel hose because it was foreseeable that certain uses of this hose would cause an extraordinary internal pressure which would fracture the meter casting. They argue that both defendants were chargeable with such knowledge, and hence were negligent in not rectifying the condition or issuing a warning about it. The argument is ingenious when viewed in the context of the history of this case. This theory was not advanced by plaintiffs in their pretrial statements nor in their case-in-chief; moreover, the thrust of their own expert testimony was that the flexsteel hose could not have created the rupture in the casting. The examination of plaintiffs' expert Crankshaw (Appendix, page 657a) reveals:
>
> 'Q. Is it your testimony, then, that if the high pressure relief valve was clean, that the jerking of the hose on the morning of April 29, 1964, could not have ruptured the cover of the meter?
>
> A. I think that is correct.'
>
> *Apart from this patently inconsistent position of plaintiffs, the testimony indicated that the Underwriters Laboratories, the recognized testing agency in the trade, had placed its stamp of approval on the use of the flexsteel hose with gasoline pumps and that the hose was in general use in the trade.*" (Emphasis supplied) (A. 47-48).

Another grossly misleading statement appears in Petitioners' Statement of the Case at page 6 of the Petition:

> "Although Goodyear Flexsteel hose had been on the market for attachment to gasoline pumps of this type

> since the late 1950's, Erie Meter Systems and its successor, A. O. Smith Corporation, had made no attempt to conduct tests with this type of hose, nor to install fail-safe devices on their units, nor to warn users and prior purchasers thereof as to the dangers inherent in this combination."

No such duty exists in the law and this allegation was rejected out of hand by the trial judge with the following remark:

> "As for liability predicated upon the failure of Erie, or A. O. Smith, to foresee the danger attendant upon the use of the Flexsteel hose, it is sufficient to state that such a duty is unreasonable and far-fetched. It must be noted that the type of pump has been on the market for several years without complaints, and that it and its components as well as the hose had been approved by the major independent testing laboratory. To require a manufacturer of a product which has been demonstrably safe, to consider and test every conceivable attachment which might be used in conjunction with that product, especially when the attachment had already been tested and certified by an independent agency, is unreasonably burdensome and is not required by law" (A. 35).

In this same connection, the Court of Appeals held:

> "The test is one of foreseeability. The trial judge concluded that Humble could not reasonably have foreseen such characteristics and consequences; to reverse that conclusion would be tantamount to a declaration that it was foreseeable as a matter of law. This we cannot do. To hold that the defendants should have known in 1964 the idiosyncrosies of the flexsteel hose which were not discovered by experts until 1967, is to ignore the realities of the case, namely, that the flexsteel hose was not a component of the pump as originally manufactured that its use was initiated over nine years after the meter was sold and installed, that the defendants were neither manufacturers nor dealers in hoses, that the flexsteel hose had received the approval

> of the Underwriters Laboratories, and that it was in general use in the trade. The Supreme Court's observation in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239 (1943) is apropos: 'Events too remote to require reasonable prevision need not be anticipated.' 320 U. S. at 483, 64 S. Ct. at 236'' (A. 48-49).

Other errors in the Statement of the Case in Petitioners' Petition for a Writ of Certiorari have been fully and adequately discussed in the Brief in Opposition filed by Respondent Humble Oil & Refining Company and will not be repeated here.

Reasons in Opposition to the Issuance of a Writ of Certiorari.

The pretrial procedure in this case followed the usual and accepted course in non-jury proceedings, was fully agreed to by petitioners, and was not prejudicial in any way.

Reasons I and II for Granting the Writ in the Petition for a Writ of Certiorari relate only to Respondent Humble Oil & Refining Company and, therefore, will not be discussed in this brief. A full and adequate discussion of these matters is presented in the brief filed by Respondent Humble.

Petitioners' Reason III entitled ''Unfair Result of Pretrial Procedures'' questions the pretrial procedure. Petitioners allege that the pretrial procedures adopted in this case resulted in giving the respondents an unfair advantage and distorted the pretrial procedures prescribed by Fed. R. Civ. P. 16 and Rule 5 of the Rules of the United States District Court for the Western District of Pennsylvania. Specifically, Petitioners object to the times at

which Pretrial Narrative Statements were filed and to an intermission between the presentation of plaintiffs' and defendants' evidence.

Rule 5 II (b) of the District Court Rules provides:

> "Non-Jury cases shall be pretried in accordance with an Order by the Judge to whom the case has been assigned."

This case was pretried solely in accordance with pretrial orders issued by the Judge to whom the case was assigned and the procedure fully complied with the requirements of Rule 5.

The record discloses that at no time did Petitioners formally object to the pretrial procedure, or to any pretrial orders issued by the Court. Plaintiffs fully consented both to the pretrial and to the trial procedure used, after full consultation with the Court and with full knowledge of the circumstances. Moreover, the pretrial procedure in this case was discussed informally with the trial judge by counsel for all the parties on numerous occasions during the presentation of motions relating to discovery and summary judgment. At these conferences counsel reported on the progress of their preparation for trial and discussed with the Court the times within which pretrial requirements should be accomplished and the case set for trial. Counsel for Petitioners participated fully in these discussions.

In addition, the issue of the fairness of the pretrial procedure was not argued in the District Court or in the Court of Appeals and is therefore waived for purposes of appeal to this Court.

With regard to the allegation at page 16 of the Petition that the Pretrial Narrative Statement of A. O. Smith was

not filed until May 5, 1967, it should be pointed out that Petitioners did not object to the date of filing nor to the time at which the reports of experts of Respondent A. O. Smith were furnished to Petitioners.

Certain facts set out by Petitioners in Argument III are patently incorrect. At page 16 of the Petition, it is stated that A. O. Smith did not file its Pretrial Narrative Statement, "including a list of twenty-four witnesses (R. 89a) until May 5, 1967". A reference to page 89a of the Appendix shows that this is clearly incorrect. The Pretrial Narrative Statement of A. O. Smith Corporation contained the names of *nine* witnesses (R. 18b-21b).

Even though Petitioners now allege that they were not given the opportunity to review the reports and tests of Respondents' experts to determine the validity of the tests performed by Respondents' experts and to prepare effective rebuttal, the fact is that in their post-trial argument before the District Court and in their brief and argument in the Court of Appeals, Petitioners adopted the position of Respondents' experts, and categorically rejected the position of their own experts. Hence, they were in no way prejudiced by an alleged lack of opportunity to review the reports and tests and prepare effective rebuttal to the testimony of Respondents' experts.

In any case, it is quite clear from a review of the testimony that Respondents' experts were subjected to a full and vigorous cross examination and Petitioners presented rebuttal testimony after their experts had had more than two weeks to analyze Respondents' theory of the accident.

Finally, Petitioners complain that the intermission between the presentation of plaintiffs' evidence and of defendants' evidence, a period of a little over one month, was

prejudicial to their case. Petitioners comment at page 20 of the Petition:

> "Judges' memories are no more infallible than jurors' memories."

Petitioners then cite a *jury* case, *Carl D. Citron v. Aro Corporation,* 377 F. 2d 750 (3rd Cir. 1967) in which several delays were held to be prejudicial. This, however, is a non-jury case. A daily transcript was made of the proceedings. The entire trial testimony was transcribed and made available to the trial court to review in arriving at the decision. All parties were given the opportunity to file lengthy post-trial briefs and did so. The case was argued on September 11, 1967 and not decided until October 19, 1967. Therefore, the trial court in making its decision had the benefit of the complete trial transcript, of briefs filed by the parties, of oral argument, and the benefit of five months from the conclusion of the trial to review the testimony.

In these circumstances, it is submitted that Petitioners were not prejudiced in any way by the pause between the presentation of plaintiffs' case and the presentation of defendants' case.

In summary, until now Petitioners have never objected to the manner in which the pretrial procedure was handled and never at any time objected to the manner in which A. O. Smith Corporation fulfilled its pretrial requirements. In addition, it is clear from the record that Petitioners were not prejudiced by an intermission in the trial.

Conclusion

For the foregoing reasons, respondent A. O. Smith Corporation requests that the Petition for a Writ of Certiorari be dismissed.

Respectfully submitted,

RAYM' ND G. HASLEY,
ROGER CURRAN,
ROSE, SCHMIDT AND DIXON,
Counsel for Respondent,
A. O. Smith Corporation,
9th Floor, Oliver Building,
Pittsburgh, Pennsylvania 15222.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 1 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1202

SPEYER, INC. AND YELLOW CAB COMPANY OF ERIE,
Petitioners

v.

HUMBLE OIL & REFINING COMPANY AND
A. O. SMITH CORP., *Respondents*

REPLY BRIEF OF PETITIONERS

WILLIAM W. KNOX, ESQ.
23 West 10th Street
Erie, Pennsylvania

JOHN G. GENT, ESQ.
1415 G. Daniel Baldwin Building
Erie, Pennsylvania
Attorneys for Petitioners

KNOX, GRAHAM, PEARSON & MCLAUGHLIN
QUINN, PLATE, GENT, BUSECK & LEEMHUIS
Of Counsel

April 1969

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1202

SPEYER, INC. AND YELLOW CAB COMPANY OF ERIE,
Petitioners

v.

HUMBLE OIL & REFINING COMPANY AND
A. O. SMITH CORP., *Respondents*

REPLY BRIEF OF PETITIONERS

Neither respondent in its brief in opposition to petition for certiorari questioned petitioners' conclusions or legal authorities set forth on pages 8, 9, 10 and 11 of the original petition for writ of certiorari, being Reason I for granting the writ. Respondent, Humble's, statement on page 11 that four of the Pennsylvania cases were mentioned by the Court of Appeals begs the question since they were mentioned for other principles.

On April 14, 1969, the United States Court of Appeals for the Third Circuit changed the language of the opinion to such an extent as to shed new light on the liability of respondent, A. O. Smith, under General Contract Law and Warranty. The defect claimed against A. O. Smith Corp. was that the valves in the dispensing unit were unable to relieve pressure from the hose side of the pump (503a, 506a, 532a, 533a), and that when the Flexsteel hose was

pulled the existing valves were not capable of relieving pressures before the casting was cracked (R. 1036a, 1037a, 1041a, 1042a, 775a, 776a, 765a, 772a, 824a, 832a, 975a, 980a, 1019a, 1021a, 1072a, 1083a). Neither the District Court nor the Court of Appeals applied the Pennsylvania law established in *Kassab v. Central Soya*, 432 Pa. 217, 246 A. 2d 848 (1968). The Court of Appeals indicated that petitioners were not entitled to recover under Pennsylvania law from A. O. Smith Corp. on a breach of warranty case because of lack of privity between A. O. Smith and Yellow Cab Company and Speyer, Inc. This was clearly contrary to the law established in Kassab, where the Supreme Court of Pennsylvania held,

> "Pennsylvania should join the fast growing list of jurisdictions that have eliminated the privity requirement in assumpsit suits by purchasers against remote manufacturers for breach of implied warranty."

For the above additional reasons, viz., failure of respondent, Humble, to respond to Petitioners' Reason I for granting the writ, and the material change of position by the Court of Appeals while this petition was pending, we again submit that the writ of certiorari should be granted.

Respectfully submitted,

KNOX, GRAHAM, PEARSON & MCLAUGHLIN

By: WILLIAM W. KNOX

QUINN, PLATE, GENT, BUSECK & LEEMHUIS

By: JOHN G. GENT